United States Court of Appeals

for the Second Circuit

APPENDIX

75-7659

UNITED STATES COURT OF APPEALS

For the Second Circuit

B

Docket No. 75-7659

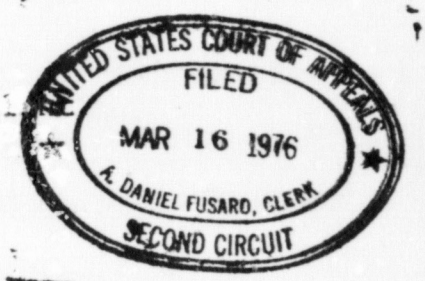
Vicente Lugo,

Plaintiff-Appellant

against

Isthmian Lines, Inc.,

Defendant-Appellee



APPENDIX FOR
PLAINTIFF-APPELLANT

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

VICENTE LUGO,

Plaintiff, 72 Civ. 3197

-against-

ISTHMIAN LINES, INC.,

Defendant.

- X

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
June 19, 1975	Plaintiff's Requests to Charge
July 17, 1975	Plaintiff's Notice of Motion and Affidavit for Directed Verdict and Judgment N.O.V.
October 8, 1975	Plaintiff's Reply Affidavit in Support of Motion for Directed Verdict and Judgment N.O.V.
October 23, 1975	Memorandum-Order denying Post-Trial Motion
	Special Verdict
October 30, 1975	Judgment
January 24, 1976	Notice of Appeal

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

VICENTE LUGO,

Plaintiff, 72 Civ. 3197 (FvPB)

-against-

NOTICE OF APPEAL

ISTHMIAN LINES, INC.,

Defendant.

- X

NOTICE is hereby given that VICENTE LUGO, plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit, from the final judgment against said plaintiff, and the verdict and order upon which it is based, dismissing the complaint, entered in this action on the 30th day of October, 1975.

DATED: New York, New York

SCHULMAN, ABARBANEL & SCHLESINGER

BY: s/ Arthur Abarbanel
Arthur Abarbanel, member of firm
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Lugo v
Isthmian
72Civ3197
7/1/75

CHARGE OF THE COURT

(Van Pelt Bryan, J.)

THE COURT: Mr. Foreman and ladies and gentlemen of the jury. You have been very conscientious here and I watched you and noticed what close attention you paid to the evidence and all the proceedings in the courtroom, and I thank you for your attitude and conscientiousness.

Thus far, your function has been to listen to the evidence and take it in and try to understand it. Now, you are about to enter into your final duties and decide the factual issues, anything which has been tried before us both. Under our system of law, in a case like this the judge has a function and the jury has a function. Each of us, you, the jury, and I, the judge, may not impinge on one another's functions.

Your function is to determine the facts here. You are the sole and exclusive judges of the facts. You pass on the weight of the evidence, the credibility of the witnesses, and you determine the reasonable inferences to be drawn from the facts.

My function, on the other hand, is to instruct you as to the law in this action, and it's your duty to accept the law as I give it to you and to apply it to the facts during your deliberations, and make your findings

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of fact here, in accordance with the law as I give it to you.

Turning specifically to the case before us, by now all of us know that Vincent Lugo was an ordinary seaman on board the S.S. STEELMAKER on June 1st, '72. Lugo was assigned to work in the ship's No. 2 hatch. While he was working there, Lugo fell into one of the tanks, suffering injuries. Lugo is now suing to recover damages for the injuries suffered in that accident, and the defendant in the action, Isthmian Lines, which owns the S.S. STEELMAKER, the vessel on which the accident happened.

Plaintiff asserts his claim against Isthmian Lines on two alternative theories: One, that the vessel, the S.S. STEELMAKER was unseaworthy and the unseaworthiness of the vessel was a proximate cause of the accident and his injuries; and secondly, that the Isthmian Lines was negligent and this negligence was a proximate cause of the injuries.

The defendant, in turn, denies it is liable to the plaintiff for the injuries he suffered. It says that it was not negligent and that the STEELMAKER was not unseaworthy. In addition, it asserts that any injuries received by the plaintiff were brought about in whole, or

ellm 3
Tr. p. 829

at least in part, by his own contributory negligence. I will discuss with you a little later, these various contentions at some length.

What I am going to do in this action to make the issues you have to decide as easy for you as I can, is to present to you a list of questions you will be asked to answer. Those questions are written out and can be taken with you into the jury room; and I will refer to the various questions as I go along, and discuss with you the various contentions that I have mentioned.

You understand, of course, that since the defendant is a corporation, it acts through its officers, agents and employees, and that it is responsible for acts committed or omitted by such officers, agents and employees in the performance of their duties.

The fact that the defendant is a corporation, however, should not influence you in any way in answering any of the questions that will be submitted to you. A corporation is entitled to the same fair trial at your hands as an individual and must not be treated differently. All of the parties here, the individual and the corporation, stand equal before the law and are to be dealt with in the same manner.

Before I get into the elements of the various

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Tr. p. 830

claims that the plaintiff has made here, let me talk to you for a few minutes about burden of proof. In a case like this, the burden of proof as to some issues, lies with the plaintiff; and the burden of proof on other issues, lies with the defendant. A party who has the burden of proof on an issue, has the burden of proving the necessary elements as to that issue by what the law terms "a fair preponderance of the credible evidence."

Thus, the plaintiff has the burden of proving each of the elements of his case by a fair preponderance of the credible evidence. The defendant, in turn, has the burden of proving each of the elements on which it has the burden of proof by a fair preponderance of the credible evidence. That burden remains on the parties throughout the whole case, and each party must satisfy you that it has sustained its burden on each of the elements or issues which it must prove.

If the plaintiff fails to establish the burden of proof of any element of his case against the defendant, then you must find in favor of the defendant on the issue presented. If, on the other hand, the defendant has the burden of proof on an issue, if the defendant fails to sustain its burden, that issue must be decided for the plaintiff.

ellm 5

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A fair preponderance of the credible evidence means simply this:

It means the greater weight of the evidence, the quality of the evidence, not just the number of witnesses. It means that the testimony on behalf of the party who has the burden of proof must be more convincing than the testimony opposing it.

Let's assume a scale for a minute. After going over all the evidence in the case, you evaluate the evidence in your minds, placing on one side of the imaginary scale all the credible and believable evidence favorable to the party who has the burden of proof on a particular issue or element. On the other side, you put all the evidence you think is credible or believable in favor of the other party. If, after doing so, the plaintiff's side of the scale on any particular issue on which the plaintiff has the burden of proof is weighted in his favor, no matter how slightly, then the plaintiff has sustained his burden of proof on that issue. The same applies to the defendant on the issue on which it has the burden of proof. If the scales are even -- that is to say, if there is an absolute balance on any particular issue, then the party who has the burden of proof has failed to sustain his burden. And, obviously, if

ellm 6
Tr. p. 832

the scales are weighted, however slightly in the defendant's favor on an issue in which the plaintiff has the burden of proof, then the plaintiff has failed to establish his burden on that issue and by the same token, the same is true with respect to the issues on which the defendant has the burden.

You ought to bear in mind that it's not the quantity of witnesses that tips the scale one way or another. It's not necessary for the defendant to have more witnesses than the plaintiff or for the plaintiff to have more witnesses than the defendant. The important thing is the quality of the witness' testimony. It's what you find to be credible, believable evidence. That is, evidence which has the quality which makes it worthy of belief, drawn from all the testimony in the case, which determines the issues.

Let me turn to the facts here. In doing so, I don't intend to review the details of the evidence with you. You have heard the statements of counsel for both the parties this morning. They went into details of the evidence at very considerable length. Moreover, this has been a short trial and, no doubt, you will remember the evidence yourselves. And it's your recollection of the evidence, ladies and gentlemen, which controls here,

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Tr. p. 833

not what I may say about it or what counsel may say about it. The fact that I don't mention any particular item of evidence as I discuss the questions before you, doesn't mean that such an item is not important or you shouldn't consider it.

In reaching a verdict, you should consider all the evidence that has been admitted in this action, as you recollect it, and weigh it carefully. I will, therefore, merely outline for you the contentions of the plaintiff on the one hand and the defendant on the other, so as to put the case in perspective, in focus, and to give you instructions as to the law you should follow in reaching your own determination on what the evidence proved.

A number of facts here are undisputed:

Lugo was a seaman assigned to the deck department of the S.S. STEELMAKER, owned by the defendant, Isthmian Lines. On June 1st'72, while the ship was in the Pacific in the general vicinity of the island of Guam, and headed eastward for Hawaii, three members of the deck crew, LaFrance and Palmer, able-bodies seaman, and Lugo, an ordinary seaman, were assigned by the bosun, Gomez, the task of going down to the No. 2 hatch and removing duct plates from a ventilating system in the

ellm 8
Tr. p. 834

deep tanks.

The three men went down a ladder leading from an escape hatch opening on the deck and got on the lower or between deck in the hold where cargo was stored. The No. 2 hatch had below the between decks, four deep tanks some 18 feet deep, and which went down into the bowels of the vessel. The two front deep tanks were covered over. There was a firm surface on top of them. Whether it was planking or metal, I'm frank to say, I do not remember. It doesn't make any difference.

The rear or aft deck tanks were open. There were three cargo or cluster lights brought down into the hold, one of which appears to have been placed at the foot of the forward ladder leading from the between decks to the main deck, and a second of which was placed in one of the deep aft tanks.

The three seaman worked at that job in the hold for an hour or so and then came up for a coffee break. After the coffee break they returned to the hold and continued with their job. The job included the passing of certain planks from one to another, with respect to the deep tank where Palmer was stationed, and apparently what was going on and Lugo was working at that and Lugo was standing at the edge of the deep tank; and apparently,

ellm 9
Tr. p. 835

LaFrance was standing some place forward of him.

After they had been working down there for about a quarter-of-an-hour or so, after the coffee break, Lugo suddenly fell into one of the deep tanks and suffered serious injuries, the origin of which are not in dispute. His original injuries included fractures of the pelvis, fracture of the radius of the right arm, damage to the urinary tract, a concussion, some sort of eye injury. And a number of members of the crew, under the direction of the ship's officers removed the hatch cover of the No. 2 hatch, lifted Lugo out of the deep tank and the ship headed back for Guam so that Lugo could be placed in the Guam Hospital.

He was in the Guam Hospital for some time. He was then transferred to the San Francisco Hospital and finally to the Public Health Service in Staten Island, where he remained until August 5th, 1972. He then took outpatient care at the Staten Island Hospital until November 21, 1974.

Thus both sides agree that there was an accident and that Lugo was injured. The question for you to determine, however, are not whether an accident happened -- because I will tell you a little later, the mere fact that an accident occurred does not establish

ellm 10
Tr. p. 836

liability on the part of anyone.-- one of the principal questions before you will be, what caused the accident to happen. The question of causation is a major concern here.

Plaintiff Lugo contends that the cause of his fall was either inadequate ventilation in the hold, inadequate lighting, or the combination of the two. Lugo claims there should have been additional lighting in the hold; that the light at the foot of the forward ladder of where he was standing when he fell should have been placed elsewhere to give more illumination, and that a third light which the men had brought down with them, should have been used.

He also contends that the ventilation in the hold was inadequate; that the ventilators should have been turned on; that there was some smell of lube oil in the hold coming from the deep tanks where lube oil had been carried some two months previous. He said it was very hot in the hold and that by reason of what he says is inadequate ventilation, he found it inadequate to work, felt weak and dizzy, and this eventually caused him to topple over into the deep tank.

Lugo contends that he did not, himself, do

ellm 11
Tr. p. 837

anything to cause the accident to happen and that it was the failure of the defendant shipowner, acting through his officers and employees in supervisory positions aboard the STEELMAKER, to take proper precautions to provide proper light and proper ventilation, which brought about his fall.

The defendant shipowner, on the other hand, strenuously denies that the accident was due to any failure or neglect on its part to provide necessary lighting or adequate ventilation for the performance of the job being done in the hold by LaFrance, Palmer and Lugo. It contends that both the lighting and the air supply were reasonable and normal. It claims that the fall was caused entirely or at least in part either by lack of due care on the part of Lugo, who was standing on the edge of the deep tank, or some physical condition of Lugo's of which it had no knowledge and could not have foreseen.

The defendant claims, if there had been any difficulty in ventilation, Lugo could have complained to the men who were working with him and could have had more light and better ventilation if he had asked for them, which he did not do.

You will recall, that there was a good deal of testimony by a witness for the plaintiff and a witness for

ellm 12
Tr. p.838

the defendant, both of whom were experts in the maritime field, about the lighting and ventilating conditions which would exist in the hold of a C-3 merchant vessel like the STEELMAKER, which was sailing in tropical waters. These experts expressed their opinions relating to whether or not the hatch covering the hold should have been removed before sending the men to work there; whether the hatch should usually be kept battened down during a Pacific voyage; whether the ventilator in the hold should have been turned on; what lighting was required; and what air conditions could be expected in a vessel such as the STEELMAKER at that time and place. I will talk to you about expert testimony a little later, and the way in which you should approach and evaluate it.

But it can be said here that the testimony of Captain Horka for the plaintiff and that of Captain Wheeler for the defendant, the two maritime experts, differed very materially as to the conditions which would be likely to prevail, which would be expected in the hold of the vessel at that point in its voyage.

Plaintiff's expert on the one hand expressed the opinion that the conditions, both as to lighting and as to air and ventilation, were likely to be poor. On the other hand, defendant's expert, Captain Wheeler,

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Tr. p. 839

was of the opinion that there would be plenty of air in the hold; that the ventilation provided was quite adequate; and that the light was sufficient to do the job required.

There was, of course, testimony by Lugo, himself; from Captain Sigda, the master of the vessel; by the mate, Minor; and the bosun, Gomez; on the conditions on the vessel during the event of June 1st, 1972, when the accident happened.

I may say, in passing, that there is no evidence in that record as to the availability of any other witness to either party--and I am talking now of LaFrance and Palmer. As far as the record shows here, both witnesses were equally available to either party and no inferences whatsoever can be drawn from anybody's failure to call them.

On the basis of all the testimony, it's for you to determine whether or not, as the plaintiff claims, the S.S. STEELMAKER was unseaworthy at the time of the accident because of the conditions in the hold; or whether the shipowner, acting through the officers and other supervisory employees on the STEELMAKER, was negligent in requesting the plaintiff to work in a place where there were not reasonably safe working conditions; and whether,

ellm 14
Tr. p. 840

if there was unseaworthiness or negligence, either of those factors was a proximate cause of the accident to Lugo and the resulting injuries.

Of course, there are also questions as to the extent of Lugo's injuries, the effect of such injuries on his ability to work, both in the past and in the future, and the amount of damages he suffered.

You will recall of course, the testimony of Lugo, himself; the doctor he produced; the doctor who was put on the stand by the defendant; and the records of his treatment in the hospital on that subject.

And, finally, there will be an additional question as to whether Lugo's own negligence contributed to the accident, and, if so, to what extent.

I am now going to turn to a discussion of the elements of these various questions and the law as applicable to it. As I told you, the plaintiff here makes two claims against the defendant, Isthmian Lines, the owner of the vessel, on two different theories:

The first theory is that the S.S. STEELMAKER was unseaworthy with respect to the conditions which prevailed in the hold of the vessel at the time that the plaintiff and the other two seamen went into the hold to work.

ellm 15
Tr. p. 841

The second, I will discuss with you a little later, is that the defendant was negligent in sending Lugo to work in an unsafe place.

The mere fact that an accident happened or that the plaintiff, Lugo, was injured, does not make the defendant liable. The Isthmian Lines is not an insurer of the plaintiff's safety. Liability against the defendant must rest upon proof of the elements of the plaintiff's case.

I will first discuss the question of whether or not the STEELMAKER was unseaworthy at the time of the accident on June 1st, '72. The plaintiff has the burden of proof by a preponderance of the evidence, as I have defined it to you, that the vessel was unseaworthy as he contends. The doctrine of unseaworthiness is founded on the ancient law of the sea, which is known as the "warranty of seaworthiness of the vessel." It imposes upon the owner of the vessel, in this action, Isthmian Lines, the duty to provide the crew with a seaworthy vessel, with seaworthy equipment. This duty imposed on the shipowner is non delegable . That is to say, the shipowner cannot relieve himself of this duty by transferring or shifting the responsibility to someone else.

To be seaworthy, a vessel must be reasonably

ellm 16
Tr. p. 842

fit for its intended use. The standard is not perfection. It is merely whether the ship and her equipment were reasonably fit for and adequate for the purposes for which she was intended. Thus, the shipowner is not required to furnish an accident-proof ship nor, as I mentioned before, is the shipowner an insurer of the safety of the members of the crew such as Lugo. The shipowner is merely required to furnish a ship with equipment reasonably fit for prudent crew members to work on. Each and every part of the ship is required to be seaworthy. Thus, the owner of a ship is under an obligation to provide a reasonably safe area in the hold of the vessel in which employees are to work.

Unseaworthiness doesn't depend on any showing of negligence on the part of a shipowner. If the vessel or its equipment are unseaworthy, even the exercise of reasonable care does not relieve the owner of its absolute duty to furnish a ship and its equipment in reasonably fit condition for intended use; nor does unseaworthiness depend on whether the owner knew of the defective condition.

If a ship fails to meet the standards I have just given you, it's unseaworthy, whether the owners knew of the defective condition or not, and no matter how the

ellm 17
Tr. p. 843

condition which rendered the ship unseaworthy came about.

Lugo's claim is that because of poor ventilation and poor lighting in the No. 2 hatch, the STEELMAKER was unseaworthy because the hatch where he was sent to work was unsafe and not reasonably fit for its intended use.

It's for you to determine whether or not the standards required in order for the ship to be reasonably safe and fit for its intended use have been met; and thus, whether or not the vessel was unseaworthy, as Lugo contended.

Lugo also claims that the defendant, acting through the ship's officers and supervisory personnel of the vessel, was negligent in sending him to work under unsafe conditions. Plaintiff claims that the defendant was negligent in not seeing to it that the No. 2 hatch was reasonably safe for the plaintiff and the other two workingmen to work in, two seamen to work in. The claim of negligence is quite distinct to the claim of unseaworthiness.

What do we mean by negligence? Negligence is simply a breach of the duty of care which one party owes to another. The owner of a vessel has the duty to exercise such care as a reasonably prudent person would exercise in similar circumstances. It has the duty to use

ellm 18
Tr. p. 844

such care in furnishing the plaintiff with a reasonably safe place in which to work and move around, and to maintain such place and the equipment located there in reasonably safe condition.

Put another way, the owner of a vessel is required to take such reasonable steps as may be necessary to prevent accidents that might be reasonably foreseeable by a careful, prudent shipowner under the circumstances.

Again, the plaintiff's burden is to prove by a fair preponderance of the credible evidence that the defendant was negligent, and to prove there had been a breach of duty of care that was owed him by the shipowner.

Of course, when I talk of the defendants here, the defendant is a corporation and it only acts through its agents and employees. The shipowner here may be liable for any injuries resulting in whole or in part from the negligence of its officers and employees, and this includes the plaintiff's fellow crew members aboard the vessel. With that in mind, in order to establish his second theory of liability, that is negligence, the plaintiff must prove by a fair preponderance of the credible evidence, that a reasonably prudent shipowner or his reasonably prudent employees aboard ship in the exercise of reasonable care would not have permitted Lugo to work under the

ellm 19
Tr. p. 845

conditions of ventilation and light which you have heard described here.

As I told you earlier, I am going to submit to you a series of questions in writing for you to answer, and I will review these questions completely with you at the end of this charge:

The first question you will be asked to answer, and I am quoting, "Was the S.S. STEELMAKER unseaworthy or was the defendant, Isthmian Lines, negligent?" This question, of course, is with respect to the conditions of the No. 2 hatch at the time the accident occurred. You will be asked to answer that question yes or no. If you answer the question no, you will go no farther and report your answer to the Court. If the answer to that question is yes, you then go on to the second question which is the question of proximate cause.

What do I mean by proximate cause? Proximate cause means, in effect, a producing cause of the accident which resulted in the injury. It must be an unbroken chain of events or circumstances flowing from the unseaworthiness or the negligence, if you find there was such, and leading to the accident. There must be a direct causal connection between unseaworthiness or negligence if you find any and the accident which caused the injuries.

ellm 20
Tr. p. 846

The question is whether any unseaworthy condition of the vessel or any negligence on the part of the shipowner played any role in producing the accident which Lugo suffered and the injury which resulted from that accident. Thus, the second written question to be submitted to you is, "Whether or not unseaworthiness of the STEELMAKER or negligence of the defendant shipowners was a proximate cause of the accident and the injuries which the plaintiff suffered."

The burden is on the plaintiff to establish proximate cause by a fair preponderance of the credible evidence. Even if you find the vessel unseaworthy or the shipowner negligent, this does not establish liability on its part.

The question here, this second question, important as it is, is: "Whether even if there was unseaworthiness or negligence, this was a proximate cause of the accident to the plaintiff and the resulting injuries."

I may say to you that the question of causal relationship between the conditions which were found in the hold, whatever you found them to be, and the accident suffered by Plaintiff Lugo, is of particular importance in this action and should be considered by you carefully.

ellm 21

Tr. p. 847 In determining the question of proximate cause there is one further contention you must take into account. The defendant contended that the accident occurred because of plaintiff's failure to take reasonable care for his own safety. That is to say, because of what is known as or called "plaintiff's contributory negligence.". I am going to discuss contributory negligence a little later with you in some detail, but if you should find that the plaintiff's own negligence was the sole cause of the accident, then the unseaworthiness or negligence of the owner could not be a proximate cause and your answer to the question on proximate cause must be no.

I should tell you at that point that as to contributory negligence, the defendant has the burden of proof on that issue. That is to say, in order to establish contributory negligence a hundred percent or less, the defendant has the burden of showing this by a preponderance of the credible evidence. If you answered yes to both Questions 1 and 2, that is the questions about negligence and unseaworthiness and proximate cause, then the next question you will have to answer concerns the plaintiff's damages.

Again, you may only consider the issue of damages if you find that the plaintiff has prevailed on

ellm 22
Tr. p. 848

at least one of his theories as against the defendant. If you find for the defendant on both theories of liability, that ends your deliberations and you need not go to the question of damages.

Because I charge you on the question of damages does not mean that I am expressing any view that the plaintiff is entitled to damages. You do not get to that question until you have established in your own minds that either unseaworthiness or negligence was a proximate cause of the accident. Whether or not plaintiff is entitled to damages depends on your answers to those questions.

The question of damages, like the other questions submitted to you, is exclusively your province and not mine. If you do come to the damage question, then plaintiff must establish his damage claim by a fair preponderance of the credible evidence, the same standard as we discussed before. On damages, the plaintiff has the burden of proof. The fact that a particular amount of damages has been claimed or referred to, is no indication whatever that that is the proper amount.

You heard counsel in summation talk about damages and talk about figures. What he says about them is suggestion you may, I suppose, take into account; but

ellm 23
Tr. p. 849

you are to determine what the damages actually are from the evidence and not from what anybody told you about them. It's in your best judgment and consideration, in your discretion after going into the factors, that I am about to talk to you. There is no mathematical formula I can give you, by which you can determine damages in a case like this.

The law's intention is to award, insofar as possible, just and fair compensation. That is to day, monetary compensation for the loss which flows directly and naturally from a jury. The theory is to make the injured party whole in terms of money for any damages or injuries which he suffered insofar as that can be done. If there is to be an award, it must be purely compensatory, to compensate the injured party for what he suffered and lost. It must not be inadequate or excessive.

Damages, then, here, should compensate Lugo; one, for the injuries and disabilities which he sustained as a result of the accident, considering their nature, extent, severity and permanence; two, for the pain and suffering which the plaintiff has experienced as a result of his injuries from the time of the accident to the present, and such pain and suffering, if any, as you find he is likely to endure in the future from these injuries;

ellm 24
Tr. p. 850

third, such loss of earnings as resulted from his injuries.

There are two elements in the loss of earnings claim: First, is the question of loss of earnings between the date of the accident and now; and the second, of course, is the loss of earnings, if any, in the future.

If you find that any of the plaintiff's injuries are permanent, you must make such allowance in your verdict as you think that circumstances warrant, taking into consideration the period of time that has elapsed from the date of the injury to the present, and the period of time plaintiff can be expected to live. In that connection, you will remember that the plaintiff is about 53 years of age and according to the mortality tables, has a life expectancy of 26.1 years. Such tables, of course, are nothing more than statistical averages. The life-expectancy figures that I have given you are not binding on you, but may be considered by you, together with your own experience and the evidence you have heard concerns plaintiff's health, habits, employment and activities in determining what the plaintiff's present life expectancy is.

As to the second item, pain and suffering, the amount to be awarded for these items is difficult to compute, since you have no yardstick except your own

ellm 25
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common sense and judgment based on your own experience. That is what you have got to exercise here and I repeat again, it's not what counsel said about such things or various rates that govern, it is your own evaluation of the situation and your own discretion. I can give you no fixed standard for determining damages for pain and suffering. In determing such amount, however, you may take into account the actual pain and suffering as indicated by the nature and extent of the injuries which plaintiff suffered and such treatments as he had to undergo for injuries. These are matters that rest in your judgment.

With respect to the matter of loss of earnings, you may take into account the extent to which plaintiff heretofore has been unable to work as a seaman or at any other occupation, if you find he could work somewhere else or the extent to which he may be able to work hereafter in other or different occupations, and the amount of earnings he may reasonably have been expected to make in such work. You may take into account the plaintiff's age, as I said was 53; but while there's been a reference to life expectancy, with respect to earnings, we are talking about work expectancy, not life expectancy. There is bound to come a time, sooner or later, when a plaintiff

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could not have worked any more, no matter how long he may have lived. According to the life-expectancy tables, the life expectancy of Lugo is 26.1 years. His working life expectancy is 12.5 years. These tables are based on experience and reflect the average life and work expectancy of persons in a given age group. Again, they are merely intended to serve as a guide to assist you in reaching a determination. You decide for yourselves about the work expectancy and life expectancy based on all the evidence in the case.

Thus, it's for you to determine how long the plaintiff may reasonably have been expected to work and what he might have been expected to earn had the accident not occurred; and by how much, if anything, his earnings were reduced in the future, solely as a result of the accident. If you should find that the plaintiff lost earnings as a result of his injuries, between the date of the accident and the present, the amount for such loss would plainly be the difference between what he would have earned had it not been for the accident, and what he did not earn because of the accident. Lost earnings includes sums paid by the plaintiff's employer to a vacation or pension plan or fringe benefits of that nature.

If you should find that the earning capacity

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of the plaintiff, for the future, has been impaired by reason of disabilities resulting from the accident, the amount of damages he should have awarded, should be the difference between what he would have earned in the future had there been no such impairment, and what, if anything, you consider he should be able to earn considering his present and future physical condition, insofar as it resulted from the accident.

In considering the amount the plaintiff should have earned in the future, if you come to that question, you may again take into account his age, the probable standard of employment, his present physical condition, education, training, previous employment; all those things that would enter into how a man might be able to work in the future.

I may say, in dealing with the question of permanent disability, whether or not he is permanently disabled and how much he is permanently disabled from working, is entirely up to you to determine. The fact that there may have been some findings on that question by the Public Health organization or by his doctor, is not binding on you in any way; it's up to you to determine from all the evidence. If you find that plaintiff, as he claims, is unable to pursue his calling of a seaman in

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the future and has been unable to do so from the time of the accident up to now, then you must take into account what other work the plaintiff is able to do and what his earnings might have been from the time he was able to resume work, up to the present, and in the future.

In calculating any loss of earnings which the plaintiff has suffered up to now, and which he may suffer in the future, you should take the work which he is able to do into account and award him only such sums as represents the difference as you view it between the amount he would be able to earn as a seaman and the amount he would be able to work in some other, perhaps, more sedentary capacity, which might be open to him. You should bear in mind in that connection that a person seeking damages for injuries is under an obligation to mitigate his damages. If he is able to do so, he is under an obligation to seek and take gainful employment and to undergo such treatment for his condition as may be beneficial.

If you find that the plaintiff here has failed to mitigate damages, as I have indicated, and could have done so, you may take this under consideration in determining the amount of any award to him. You should first determine the amount of award for loss of earnings by

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computing the amount of pay plaintiff may have lost from the day of the accident to the present. Then you determine the amount of loss of earning for the future, if any, as a result of the accident. If you determine that there is a loss of future earnings arising out of this accident, then there is one more factor you must take into account. It makes a great difference to a person whether he is paid a sum of money in installments over a period of years, or whether he is paid a lump sum at once.

In this action if you award the plaintiff a recovery for loss of future earnings, the plaintiff would receive a lump sum. Therefore, you should take into account the fact that the present value of plaintiff's future earnings paid now, is less than he would ultimately have received, since the amount will be paid now and the plaintiff will not have to wait to be paid the money in installments as he would if he were working for it. He would have it on hand. He will be able to get from it a return from that lump sum. Plaintiff would not have been able to get a return from that money had it been paid to him in installments or wages, of course.

Thus, the amount which you fix as the diminution of plaintiff's earning capacity in the future, if any,

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must be reduced or discounted to present cash, to present cash value, in order to make allowance for the earning power of money. On that whole question of damages, past and future pain and suffering, permanent or partial disability, and for loss of earnings, there is no exact yardstick except your own common sense based on experience.

One final word before I leave the damage question. You are not to be actuated by any sympathy or desire to be charitable, by giving away someone else's money. Damages are to be based solely on the amounts which would compensate the plaintiff in money for the injuries he suffered, the pain and suffering and loss of wages.

Thus, Question 3, which I will submit to you will be phrased this way:

"What is the total amount expressed in dollars of the damages suffered by the plaintiff, Lugo, as a result of the accident."

That question is to be answered only if you have answered Questions 1 and 2 yes; and there you will fill in the total amount of damages expressed in dollars, a dollar figure.

Two more questions, and you will be glad to

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hear that I am shortly coming to an end. They concern the contention made by the defendant that the plaintiff himself failed to take reasonable care for his own safety under the conditions under which he was working and thus was guilty of contributory negligence. I have already mentioned to you, if you should find that the contributory negligence of the plaintiff was the sole cause of the accident which occurred, then your answer to Question 2, with respect to proximate cause would be in the negative and you need not go into it further.

But, the evidence also claims that even if the negligence of the defendant was not -- of the plaintiff was not the sole cause of the accident, at least it was one of the causes. The next two questions deal with that contention.

What is contributory negligence? Everyone is required to take reasonable precautions for his own safety, such reasonable precautions as an ordinary, prudent and careful person would take under all the circumstances. Vincent Lugo was charged with that obligation. When we speak of contributory negligence, we mean such an act or omission to act on Lugo's part, as would amount to a want of ordinary care for his own safety under the circumstances and which is proximate cause of his accident

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and the resulting injuries.

As I have told you, on the question of contributory negligence, the defendants have the burden of proof. That is, the defendant must establish by a fair preponderance of the credible evidence that Lugo was contributorily negligent; and if it does not, your decision on that issue must be in favor of the plaintiff. I do not have to repeat what I have talked to you earlier about in terms of what burden of proof means. I think that is quite clear now. The question for you to determine is, therefore, whether the actions or failure to act of Lugo, on June 1st, 1972 while working in the No. 2 hatch, constituted contributory negligence on his part and whether contributory negligence on his part was a proximate cause of the happening of the accident.

That is the fourth question you will be asked to answer, and the question will be phrased this way:

"Did negligence of the plaintiff, Lugo, contribute to the happening of the accident?"

If your answer to the fourth question is yes, that is to say, if you find that the negligence of the plaintiff contributed to the happening of the accident, then the next question will be:

"To what extent did his negligence contribute

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to the happening of the accident?"

You will be asked to express in terms of percentage, what Lugo's own negligence contributed to the happening of the accident, if you find that to be so. Let's talk about percentage. Let me take an example. I'm not suggesting remotely that it applies in this action, I am just pulling it out of thin air.

For example, if you should have found that 50 percent of the cause of the accident was negligence on the part of the plaintiff, you'd put down that percentage in answer to the question. I used the figure "50 percent" because I merely picked it out of the air as an example.

Second thing, with the contributory negligence, as 20 percent, 60 percent or whatever percentage, if any, you might determine it to be.

And the last question to be put to you, therefore, is if your answer to Question 4 is yes,"To what extent expressed in terms of percentage, did the negligence of Plaintiff Lugo contribute to the happening of the accident and his resulting injuries?"

You put down in answer the percentage figure of what you believe that to be.

Just one or two general matters and I am almost done.

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I have said you are the sole judges of the facts. It is your recollection of the facts that govern, not mine; not what I say to you about the facts or what counsel says. It's what you recollect the facts to be.

You are, also, the sole judges of the credibility of the witnesses. Questions as to a witness's credibility are exclusively for you to pass upon and it's up to you, the jury, to determine what parts of the evidence you believe or what parts of the evidence you wish to disbelieve and reject. Credibility is just another word for believability and the appraisal of the credibility given to the testimony of a witness is governed very much by your own plain, everyday common sense, which is really why we have got juries, because we know they have got plain, everyday common sense. People in your daily lives may tell you things which may or may not influence important decisions that you make. You consider whether these people had the capacity or the opportunity to observe, be familiar with and remember and report things that they told you.

You consider any possible interest they have in the results to be obtained, any bias or prejudice, any motive to tell an untruth. You consider their character, They are inherently believable or not. You consider their

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demeanor.

It is the same thing with witnesses. You watch them on the stand as they testify. You ask yourself whether they know what they are talking about and are fairly reporting it. You evaluate their full truthfulness. You decide how their testimony strikes you. You take into account the extent to which they may have been impeached as a witness, either generally or specifically, and whether they have made any statement inconsistent with or contradictory to the testimony they gave on the stand. You take into account motive, if any, to testify falsely.

In other words, what you do is to size up a person and determine whether he is truthful, candid and straightforward, and whether you think you should believe his testimony. Of course, if a witness is interested in the outcome, you may take that factor into account in evaluating his testimony. It doesn't mean that he is not telling the truth or the whole truth; it's simply one of the factors you take into account in making that evaluation. Parties to a litigation are interested witnesses. The plaintiff plainly is an interested witness, since he has a vital interest in the outcome of the case. Other witnesses connected with the other party

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may have some interest directly or indirectly. You must judge their interest in terms of credibility.

Of course, because a person is an interested witness does not necessarily mean he is not telling the truth. Interest is only one of the factors you may consider, along with the attendant circumstances of the weight and credibility to be given to testimony.

One further word about witnesses. You have heard a good deal of expert testimony: The two maritime experts, the two doctors. You are not bound to accept such testimony. While experts may be specially trained by education, background and experience, to express opinions on these matters, you are at liberty to accept or reject their testimony or opinions, or to accept only such parts as commend themselves to your own judgment and common sense.

The testimony of an expert, like that of any other witness, is just the same as that of any other witness except that the expert is testifying on a subject of which he has special knowledge.

I want to touch briefly on the subject of circumstantial and direct evidence.

Direct evidence exists when a witness testifies to what he saw, what he observed, what he heard, what he

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knows of his own knowledge, what comes to him by virtue of his senses.

In the case of circumstantial evidence, proof is given of facts or circumstances from which one may infer other connected facts which reasonably follow in the common experience of mankind. Let me give you an example:

You are sitting at home at night. The shades are drawn. Somebody comes in wearing a raincoat, rubbers and carrying a dripping umbrella, with his coat wet. You can reasonably conclude it's raining outside, and that is so even though you, yourself, have not seen the rain. In other words, you don't know of your own knowledge or your own direct observation that it's raining, but the circumstances you observed lead you to the natural, logical and reasonable conclusion that it's raining. That is, of course, an over-simplification of what I am talking about, but it is a little of what circumstantial evidence is.

Circumstantial evidence is of just as much value as direct evidence if it leads to the natural and logical conclusions that I have described.

What you are called on here is to ascertain the truth. Sympathy plays no part in your deliberations,

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nor does the fact that the plaintiff is an individual and the defendant is a corporation. As I have told you, both sides are entitled to an evenhanded, dispassionate justice.

During the course of the trial, I passed on various questions concerning admissibility of evidence and, of course, motions made by counsel. Anytime I have passed on these questions, they are not to give rise to inferences on your part. They are matters of procedure and law. They are my concern, not yours. Where Ihave ruled that testimony is to be stricken from the record, or a question is not to be asked, these matters must not form any part of your deliberations; forget them. They are not part of the evidence here.

I do not think I have to go into the duties of jurors or delve into the fairness or impartiality with which I know you are going to consider the case, It's your duty to try the case and decide fully and impartially, without fear or favor, and solely on the evidence as you recollect it.

Each of you, when you go into the jury room is entitled to his or her own opinion, but you are required to exchange views with each other.

That is the very purpose of jury deliberation, trying to get a consensus of views. You exchange your views and discuss and weigh the evidence amongst you. If

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you have a point of view and if after listening to the other jurors it appears that your judgment is open to question or your point of view is wrong, then, of course, you should have no hesitancy in yielding your point of view; but it is only that you are convinced that the opposite view is the correct one and one that satisfies your own judgment and conscience that you are to do so. You are not to give up a point of view that you can conscientiously believe in, simply because you are outweighed and outnumbered.

As I told you on these somewhat complicated issues, I am going to submit this list of written questions and they are going to pose the questions in the case; and the five questions, which I will read to you, and I will give your foreman a sheet containing them:

Question 1: "Was the S.S. STEELMAKER unseaworthy or was the defendant, Isthmian Lines, negligent?"

Of course, we are talking about negligence in connection with conditions to the hatch and unseaworthiness with respect to conditions in the hatch. You answer that yes or no. If you answered Question 1 no, you need go no farther, and report your answer to the Court.

Then, No. 2. If your answer to Question 1 is yes, "Was such unseaworthiness or negligence a proximate

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cause of the accident and the resulting injuries to Plaintiff Lugo?"

Again, answer yes or no. If you have answered Question 2 no, you need go no further and you report your answers to the Court.

If you have answered both of the first questions yes, you will go on to consider the remaining questions.

The third question: "What is the total amount expressed in dollars of the damages suffered by Plaintiff Lugo as a result of the accident?"

Question No. 4: "Did negligence of the plaintiff, Lugo, contribute to the happening of the accident, and his resulting injuries?"

Yes or no. And 5, if your answer to Question 4 is yes: "To what extent, expressed in terms of percentage, did the negligence of Plaintiff Lugo contribute to the happening of the accident and the resulting injuries?"

You are a jury of six, ladies and gentlemen, but I am sorry to say, I will have to excuse the alternates very shortly. Five of you must agree on your decision to a particular question submitted to you, whether for the plaintiff or defendant, before you can consider the next question. Once five of you agree on a particular question, all six of you then go on to consider the next

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question. Any dissenter from any prior question must disregard his earlier dissent and accept the decision of his colleagues and then go on to the next question. If any five of you agree on the answer to one question after another, each time five of you agree on the answer to that question, put down your answer and proceed to the next question until you have finally completed the list. Your foreman will advise the Court when you have answered, reached a point when you should report to the Court, or when all the questions posed have been answered.

As far as the exhibits in evidence, if you want to look at any of them, if your foreman will be good enough to send me a note, I will see you get whatever you wish, and I will be available to you throughout your deliberations.

I think the oath that you took here sums up your duty, which is: "Without fear or favor to any man, to well and truly try the issues submitted to you by the Court in this action."

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

VICENTE LUGO,

Plaintiff

-against-

ISTHMIAN LINES, INC.,

Defendant.

- X

Judge Richard H. Levet

73 Civ. 3197 IBW

REQUESTED CHARGES TO JURY

Plaintiff requests the Court, in addition to the usual charges concerning maritime negligence, unseaworthiness, maintenance and cure, contributory negligence and damges, to give to the Jury the following additional charges:

1. Under the U. S. Maritime Law, a shipowner has an absolute and non-delegable duty to keep and maintain the ship, its deck, appliances, gear, tools, equipment and appurtenances, in a safe and seaworthy condition at all times, and to provide a safe place of work. Mahnick v. Southern Steamship Co. 321 U.S. 96, 64 S.Ct. 455 (1944); The Osceola 189 U.S. 158, 23 S.Ct. 483 (1903); Lindgren v. U.S. 281 U.S. 38, 50 S.Ct. 207 (1930); The Arizona v. Anelich, 298 U.S. 110, 56 S.Ct. 707 (1936); McAllister v. Magnolia Petroleum Company 357 U.S. 221, 78 S.Ct. 1201 (1958).

2. Under the Maritime Law, every shipowner owes to every member of the crew employed aboard the vessel the duty to keep and maintain the ship, its decks, appliances, gear, tools

and equipment of the vessel in a seaworthy condition at all times.

To be in a seaworthy condition means to be in a condition reasonably suitable and fit to be used, for the purpose or use for which provided or intended.

Liability for an unseaworthy condition does not in any way depend upon negligence or fault or blame. That is to say, the shipowner or operator is liable for all injuries and consequent damage proximately caused by an unseaworthy condition existing at any time, even though the owner or operator may have exercised due care under the circumstances, and may have had no notice or knowledge of the unseaworthy condition which proximately caused the injury or damage. Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 550, 80 S.Ct. 926, 933 (1960).

3. The duty of the vessel and its owners is to provide safe, proper and adequate equipment and appliances and to exercise reasonable care toward the seaman and the failure to do so constitutes negligence.

4. If the Jury finds that the plaintiff was injured as a result of any employer negligence, the Jury is to return a judgment for the plaintiff. Rogers v. Missouri Pacific Railroad Co., 352 U.S. 500, 77 S.Ct. 443 (1957).

5. The owner has an absolute duty to furnish reasonably suitable appliances and appurtenances. If he does not, then no amount of due care or prudence excuses him, whether he knew or could have known of its deficiency at the outset or

after use. Cox v. Esso Shipping Co., 247 F.2d 629 (5th Cir.1957).

6. If shipowner's negligence played any part, even the slightest in producing injury, seaman can recover. DeLima v. Trinidad Corporation, 302 Fed.2d 588 (1962 2nd Cir.)

7. It is the continuing duty of the defendants as the plaintiff's employers to use ordinary care under the circumstances then and there existing, to furnish the plaintiff with a reasonably safe place in which to work and to maintain the place of work in a reasonably safe condition.

8. Reasonable care and caution is not an element of unseaworthiness. DeLima v. Trinidad Corporation, 302 F.2d 588 (1962 2d. Cir.)

9. As members of the Jury, you have the right to accept or reject the testimony of expert witnesses. You may consider such testimony advisory only and may disregard it altogether substituting your own experience in life, in its place.

10. If the defendants required the plaintiff to do his work in a dangerous manner where there were other and safer ways to do it, that constitutes negligence. Kanzadis v. U.S., 212 F.Supp. 842 (S.D.N.Y. 1954).

11. It was the affirmative duty of the defendants to warn the plaintiff in an effective way of dangers not reasonably known, and it was also the defendants' duty to take effective action in light of the particular condition of the particular seaman to remove those dangers. Beck v. Pacific-Atlantic Steamship Co., 180 F.2d 366, 1950 AMC 744 (2d Cir. 1950); McDonough v. Buckeye S.S.Co., 103 F.Supp. 473, Aff. 6 Cir., 1952 200 F.2d 588 (N.D. Ohio 1951).

12. There is a complete divorcement of unseaworthiness liability from the concepts of negligence.

13. Custom and practice, especially of prudence, is relevant and significant in equating conduct with that of the law's fictional ordinarily careful shipowner. Davis v. Parkhill-Goodloe Company, 302 F.2d 489 (1962) 5 Cir.; Schlichter v. Port Arthur Towing Co., 5 Cir. 1961, 288 F.2d 801, 1961 A.M.C. 1164; June T., Inc. v. King, 5 Cir. 1961, 290 F.2d 404, 1961 A.M.C. 1431; Gleason v. Title Guarantee Co., 5 Cir. 1962, 300 F. 2d 813.

14. It is the duty of the owner of the ship to provide a seaworthy ship with appurtenances, appliances and equipment, and to provide a safe place of work, that this duty is absolute and not dependent upon negligence, that it is inalienable and continuing, and that proof of injury caused by the existence of unseaworthiness is all that is necessary to impose liability on the owner of the ship. This means that the defendant was obligated to furnish and maintain safe working conditions. Seaworthiness is reasonable fitness for the particular voyage, or directed to the present case, reasonable fitness for the particular uses which plaintiff was making of the ship at the time of his alleged injury and death.

15. Negligence is just exactly what it means, it is legally defined as the failure to discharge the duty owing to another. The law says that the defendant owed plaintiff

a duty to give him a reasonably safe place to work and with reasonable safe appliances.

16. Negligence means in its relation to plaintiff that the defendant had a duty to exercise through its employees, ordinary care. Ordinary care is that which would be the conduct of a reasonable and prudent person under similar circumstances. It is a breach of that duty of ordinary care, if defendant's employees conducted themselves either through action or failure to act, in such a manner as to create a risk of injury to the plaintiff which a reasonable and prudent person would have anticipated and guarded against under similar circumstances. If you find that acts of employees of the defendant, or failure to act, created a risk of harm to plaintiff, which reasonable persons similarly situated would have anticipated and guarded against, that would mean that you find the defendant negligent.

17. "Seaworthy" means that under circumstances existing at the time of the injury, the vessel and her equipment, appliances, gear and appurtenances were reasonably fit to perform the duty of safety, which this vessel owed to human beings aboard her, and to perform duties for which they were intended. Vickers v. Turney, 290 F.2d 426 (5th Cir. 1961); Cox v. Esso Shipping Co., supra.

18. The shipowner also has a duty to exercise, through its employees, ordinary and reasonable care, in relation

to the plaintiff. Ordinary care is that which would be the conduct of a reasonable and prudent person under similar circumstances. A failure to use ordinary care is called negligence. It is a breach of that duty of ordinary care if the vessel's employees conducted themselves either through action or failure to act in such a manner as to create a risk of injury to the plaintiff, which reasonable and prudent person would have anticipated and guarded against under similar circumstances. If you find that acts of any of the employees of the vessel, or their failure to act, created a risk of harm to the plaintiff, which the employee did or reasonably should have anticipated and should have guarded against, that would mean you find the defendant negligent. Cox v. Esso Shipping Co. supra; Gold v. Groves, 182 F.2d 767 (3rd Cir. 1950); Kanzadis v. U.S., 121 F. Supp. 842 (D.C.S.D. N.Y. 1954).

19. In either of the actions under the Jones Act which requires a showing of negligence or under the doctrine of unseaworthiness, it is provided that the fact that the employee or seaman may have been guilty of contributory negligence, is not a bar to the right of recovery, but the damages shall be diminished in proportion to the amount of negligence attributable to such employee. Stark v. American Dredging Co., 66 F.Supp. 296 (1946); American Stevedores v. Porello, 67 S.Ct. 847, 91 L.Ed. 1011 (1947); McGee v. U.S. 165 F.2d 207 (1947); Cox v. Esso Shipping Co., supra.

20. It was not necessary for the plaintiff to have exercised the best possible judgment in order to be deemed free of contributory negligence. His conduct is to be measured only by what was reasonable under the particular circumstances.

21. If the plaintiff was not negligent, you do not diminish the damages at all.

22. The plaintiff must prove his cause of action by a fair preponderance of the evidence. If the evidence is evenly balanced as to whether the defendant failed in its duty toward the plaintiff, then your verdict must be for the defendant. If the preponderance of the evidence is with the defendant, your verdict must be for the defendant. If, however, the evidence preponderates, no matter how slightly, in favor of the plaintiff, then as to these matters your verdict should be for the plaintiff.

23. By preponderance of evidence, the Court does not refer to the greater number of witnesses, but rather to the quality of the evidence.

24. The vessel and her owner were liable for injuries received by a seaman, and as a result of the unseaworthiness of the vessel or failure to supply and keep in order, the proper appliances, equipment, and appurtenances of the ship. Such liability arises, although the unseaworthiness was the result of the negligence of a fellow seaman, as a duty to furnish a

seaworthy ship and appliances and equipment, is non-delegable. Due diligence would not release the owner or the ship of the obligation of unseaworthiness. A seaman does not assume the risk of unseaworthy equipment and appliances, and contributory negligence only goes to the reduction or apportionment of damages. Mahnich v. Southern S.S. Co., supra; Cortes v. Baltimore Insular Line, 287 U.S. 367; Beadle v. Spencer, 298 U.S. 124, 80 L.Ed. 1082, 56 Sup. Ct. 712; Carlisle Packing Co. v. Sandanger, 259 U.S. 255, 66 L. Ed. 927, 42 S. Ct. 475.

25. The employer must make proper tests and inspections to discover dangers in the place where its employees must work and after ascertaining their existence, must take reasonable precautions for the safety of the employees. The employee has a right to rely upon the performance of this duty by the employer and to govern his actions accordingly. 35 A.M. Jurisprudence, Page 604; Williams v. Atlantic Coastline Company, supra.

26. Proximate cause is that cause which is the natural and continuous sequence, not broken by any efficient intervening cause, producing the result complained of, and without which it would not have occurred. Rogers v. Missouri Pac. R. Co., 352 U.S. 500, 77 S.Ct. 443 (1957).

27. If two causes contribute to an accident and if the defendants are responsible for only one of these causes, the

defendants are nevertheless liable for the full consequences of the accident.

28. If you find that defendant did not provide plaintiff with adequate, sufficient or proper lighting to aid and assist him in his work at the time of the accident and this in some way caused or contributed to plaintiff's accident and injury then you must find for the plaintiff.

29. Defendant is required to provide adequate and proper ventilation in hatches and holds when seamen are required to work there and the failure to do so constitutes negligence and unseaworthiness. Rivera v. Rederi, A/B Nordstjernan, 456 F.2d 970, 1972 AMC 804 (1 Cir. 1973), Carey v. Lykes Bros. 1972 AMC 619 (5 Cir. 1972) 455 F.2d 1192, Gary James v. Sealand Service, 1972 AMC 624 (5 Cir. 1972).

30. An unseaworthy condition does not become seaworthy if it is ratified by custom. Weeks v. Alonzo Cothron, 1972 AMC 2602 (5 Cir. 1972).

31. The fact that one witness is disinterested and the other interested must be considered by the Jury in determining the credibility they will giva the testimony of the respective witnesses, but the Jury may, if they see fit under the evidence, give greater credence to an interested witness than to a disinterested witness.

32. As members of the Jury, you have the right to accept or reject the stestimony of expert witnesses. You may consider such testimony advisory only and may disregard it altogether substituting your own experience in life, in its place.

33. If the defendants required the plaintiff to do his work in a dangerous manner where there were other and safer ways to do it, that constitutes negligence. Kangadis v. U.S., 212 F. Supp. 842 (S.D.N.Y. 1954).

34. It was the affirmative duty of the defendants to warn the plaintiff in an effective way of dangers not reasonably known, and it was also the defendants' duty to take effective action in light of the particular condition of the particular seaman to remove those dangers. Rock v. Pacific-Atlantic Steamship Co., 180 F.2d 866, 1950 AMC 744 (2d Cir. 1950); McDonough v. Buckeye S.S. Co., 103 F. Supp. 473, Aff. 6 Cir., 1952, 200 F. 2d 583 (N.D. Ohio 1951).

35. It is not possible to lay down from a precise mathematical formula by which pain and suffering as an element of damages may be properly measured and reduced to dollars and cents. The matter is left largely to the common sense and knowledge of the jurors in light of your common knowledge and general experience and without regard to sentimental or fanciful standards. 25 C.J.S. 693 p. 64; 13 N.Y.J. 376; Holter v. Brunner, 26 N.J. 32.

36. The plaintiff is entitled to claim as damages lost benefits normally made on his behalf by the employer to the pension, welfare and vacation funds of the plaintiff's Union. Cruz v. American Export Isbrandtsen Lines, Inc., 310 F. Supp. 1364 (S.D.N.Y. 1970) Fn 37, p. 1370.

Respectfully submitted,

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QUESTIONS FOR THE JURY

1. Was the S/S STEELMAKER unseaworthy or was the defendant Isthmian Lines Inc. negligent?

Yes ✓ No ____

[If you answered Question #1 "No", you need go no farther and you will report your answer to the Court.]

2. If your answer to Question #1 is "Yes", was such unseaworthiness or negligence a proximate cause of the accident and the resulting injuries to plaintiff Lugo?

Yes ____ No ✓

[If you have answered Question #2 "No", you need go no farther and you will report your answers to the Court. If you have answered both of the first two questions "Yes", you will go on to consider the remaining questions.]

3. What is the total amount, expressed in dollars, of the damages suffered by plaintiff Lugo as a result of the accident?

$_____

4. Did negligence of the plaintiff Lugo contribute to the happening of the accident and his resulting injuries?

Yes ____ No ____

5. If your answer to Question #4 is "Yes", to what extent, expressed in terms of percentage, did the negligence of plaintiff Lugo contribute to the happening of the accident and his resulting injuries?

_____ %

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

VICENTE LUGO,	:	
	:	Judge Frederick Van Pelt Bryan
Plaintiff,	:	
-against-	:	72 Civ. 3197
ISTHMIAN LINES, INC.,	:	MOTION FOR DIRECTED VERDICT AND FOR JUDGMENT
Defendant.	:	NOTWITHSTANDING THE VERDICT OR FOR A NEW TRIAL

Plaintiff, VICENTE LUGO, moves this Court pursuant to Rules 50 and 59 of the Federal Rules of Civil Procedure and all other appropriate and pertinent rules and regulations, to set aside only that portion or part of the verdict of jury pertaining to the unseaworthiness or negligence as a proximate cause of the accident and the resulting injuries to the plaintiff, rendered in the above entitled action on July 1, 1975 stating that there was no proximate cause causing the accident and resulting injuries and to enter a judgment in accordance with plaintiff's motion for a directed verdict or in the alternative by judgment notwithstanding the verdict or for a new trial.

Plaintiff's motion for a directed verdict and judgment notwithstanding the verdict or for a new trial with respect to that portion of the proximate cause count of the verdict, should be granted because of the following reasons:

1. The verdict of the jury is inconsistent in that the jury found unseaworthiness or negligence but there was no proximate cause of the accident and the resulting injuries, which is

contrary to the weight of the evidence presented during the course of the trial and is against the existing law.

2. The evidence during the course of the trial conclusively shows that there were facts of sufficient and ample negligence or unseaworthiness to warrant the finding that these were the proximate cause of plaintiff's accident and resulting injuries.

3. That the jury verdict on this count is against the weight of the evidence presented and the law in that there was no evidence presented or produced during the course of the trial to warrant a finding that there was no proximate cause.

4. The Court erred in refusing to charge the jury that if the plaintiff was injured as a result of any employer's negligence, which played any part, even the slightest, in producing the accident and resulting injuries, they must find for the plaintiff.

5. The Court erred in refusing to permit plaintiff medical expert to testify in response to a hypothetical question that the improper and inadequate ventilation present could medically and causally result in plaintiff's accident.

6. The Court erred in refusing to submit a special verdict to the jury as requested on the contributory negligence charge by presenting a separate verdict that the contributory negligence has to be a proximate cause in order to be considered, thus fostering and causing an inconsistent verdict.

7. The refusal of the Court to grant plaintiff's application for a mistrial in order to secure the testimony as to the amount of money that was paid as expenses and wages to David Le France, a witness in the previous trial, was prejudicial and in error.

Dated: New York, New York
July 16, 1975

SCHULMAN, ABARBANEL & SCHLESINGER

By: S/ARTHUR ABARBANEL

Member of the Firm
Attorneys for Plaintiff
350 Fifth Avenue
New York, New York 10001

To:

KIRLIN, CAMPBELL & KEATING, Esqs.
Attorneys for Defendant
120 Broadway
New York, New York 10005

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -X

VICENTE LUCO,

Plaintiff,

-against-

ISTHMIAN LINES, INC.,

Defendant.

- -X

Judge Frederick Van Pelt Bryan

72 Civ. 3197

AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

ARTHUR ABARBANEL, being duly sworn, deposes and says:

1. I submit this affidavit in support of plaintiff's motion for a directed verdict and for judgment notwithstanding the verdict or for a new trial solely with respect to that portion of the jury's verdict which found that the unseaworthiness or negligence was not a proximate cause of the accident and the resulting injuries to the plaintiff.

2. At the outset your deponent wishes to state that the major issue before this Court on this motion is whether the evidence of negligence or unseaworthiness which was presented during the course of this trial and found by the jury was a proximate cause of plaintiff's accident and injuries. Since the jury found in the application being made negligence or unseaworthiness, it is therefore not an issue /that there was negligence or unseaworthiness present. For purposes of this motion this finding is to be accepted and one cannot go beyond it and speculate as to what facts the jury made this finding.

3. The verdict of the jury is inconsistent in that the jury found negligence or unseaworthiness but that there was no proximate cause produced by this which resulted in plaintiff's accident and injuries. Not only is the verdict inconsistent but contrary to the weight of the evidence produced during the course of the trial and is against the existing law. As indicated previously for purposes of this motion, one has to accept that the hatch was improperly and inadequately ventilated and/or there was inadequate and improper lighting for the work being performed. The following evidence proved during trial showed that this negligence or unseaworthiness precipitated and was the proximate cause of the accident and resulting injuries.

(a) The air in the No. 2 hatch was hot, stale, musty, stuffy and humid at the time of the accident.

(b) The hatch had been closed for approximately 21 hours prior to the accident.

(c) The air was not circulated and unfresh.

(d) The ventilation system was not turned on at the time of the accident.

(e) The temperature inside the hatch was approximately 100° and the outside temperature was lower at approximately 90° with a strong sea breeze existing of five knots on the open deck.

(f) At the time of Mr. Lugo's accident and for some period prior thereto, he had been sweating excessively and had difficulty breathing because of the condition of the air in the hatch.

(g) Mr. Lugo took salt during his coffee break and changed his shirt because of the hot humid condition in the hatch.

(h) Just prior to the time of his accident, Mr. Lugo, in addition to having difficulty breathing, was gasping for breath, felt faint and dizzy.

(i) Mr. Lugo's health was good and he had no problems or conditions which would cause him to faint or lost consciousness.

(j) When he started to faint and lose consciousness due to the inadequate and improper lighting present, he had difficulty in seeing and could not control his fall because of this, even if his state of consciousness permitted him.

Therefore, the aforesaid evidence substantially and by its weight clearly shows without any doubt that the acts of negligence or unseaworthiness was the proximate cause of plaintiff's accident and resulting injuries. No other conclusion or inference can be drawn from these facts.

4. The defendant did not produce any witnesses or any evidence during the course of the trial which rebutted this or showed or established that the proximate cause of Mr. Lugo's accident was contrary to the aforesaid. Therefore, the only conclusion that one can make with respect to the jury verdict concerning proximate cause is that it is clearly against the weight of the evidence, the law and resulted in an inconsistent verdict.

5. It is respectfully submitted that the Court erred in refusing to charge as requested by plaintiff's counsel that if the jury found that the plaintiff was injured as a result of any of the defendant's negligence, which played any part, even the slightest, in producing the accident and resulting the injuries that it must find for the plaintiff. This charge is in conformity with the existing law as set forth in the following cases:

Rogers v. Missouri Pacific R.R. Co., 352 U.S. 500, 77 S.Ct. 443 (1957);
Kangadis v. U.S., 121 Fed.Supp.842(S.D.N.Y. 1954);
Ferguson v. Moore-McCormack Lines, 352 U.S. 522, 77 S.Ct. 457 (1957)
Gallick v. B&O R.R.Co., 372 U.S. 108, 83 S.Ct. 659 (1963)
Ammar v. American Export Lines, Inc., 326 Fed. 2d 955 (2d Cir. 1964).

One can only conclude that the jury concluded defendant's negligence or unseaworthiness was a remote cause. The charge with respect to negligence as set forth by the Court withdrew from the jury the question of remoteness of proximate cause and did not define it in clear terms as required. The test, as set forth in the case of Rogers against Missouri Pacific R.R. Co., supra, is stated by the Court as follows:

> "simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence" (352 U.S. at 506, 77 S.Ct. at 448, 1 L.Ed. 2d 493).

In view of the fact that the jury found negligence or unseaworthiness, it became of the utmost importance that the jury understood to what degree negligence would have to play in order to establish causal relationship or proximate cause. Without this instruction and understanding the jury was at a disadvantage in deciding and being able to arrive at a proper determination and verdict. The failure of the Court to properly and adequately instruct the jury, as to this, is grave and reversible error and contrary to the weight of the law as set forth herein. It caused the jury to render an improper and inconsistent verdict. If the Court charged as requested, the jury would have had a clearer precise understanding as to what constitutes proximate cause, and it would appear that the jury's verdict in all likelihood would be different.

6. The Court further erred in refusing to permit plaintiff's attorney during the course of the trial to ask the medical expert, Dr. Leo J. Koven, a hypothetical question that would have established that the improper and inadequate ventilation, which the jury found, could with a reasonable degree of medical certainty, bring about, or cause and result in plaintiff's accident and injuries. The hypothetical question which plaintiff's attorney was posing to his medical expert, Dr. Leo J. Koven, would have contained the facts of the case as presented during the trial and would have established through the expert testimony that these facts could with any reasonable degree of medical certainty proximately cause the accident. The Court, in refusing to permit this question, erred and prevented the jury from having before it as a guide and standard an expert's opinion with respect to cause or relationship of the facts and the resulting accident.

It is obvious, not only from the issues involved in the case at bar, but more so now as a result of the jury's verdict and finding that this was an extremely crucial and essential piece of evidence which should have been presented to the jury. The answer to this question would have shown that the negligence or unseaworthiness claimed could have caused plaintiff's accident and in fact was the only logical cause of the accident. Not only was it established by Mr. Lugo's testimony during the course of the trial that these conditions caused his accident but the jury would also have available as guidance expert testimony to this effect. Without this testimony, the jury was deprived of this and as a result came up with an obviously inconsistent verdict and one which was against the weight of evidence and law. If this evidence was

available to the jury, it is likely that the result would have been different.

7. The Court in refusing to itemize the special verdicts or questions to the jury with respect to contributory negligence, by separating it as it did on negligence and unseaworthiness, erred and unintentionally conveyed to the jury that the standard with respect to the proximate cause of the negligence and unseaworthiness was higher and different than that of contributory negligence. The Court submitted as a special verdict or question for the jury concerning negligence and unseaworthiness the following:

> 1. Was the S/S STEELMAKER unseaworthy or was the Isthmian Lines, Inc. negligent?
>
> Yes _____ No _____
>
> [If you answered Question #1 "No", you need go no farther and you will report your answer to the Court.]
>
> 2. If your answer to Question #1 is "Yes", was such unseaworthiness or negligence a proximate cause of the accident and the resulting injuries to plaintiff Lugo?
>
> Yes _____ No _____
>
> [If you have answered Question #2 "No", you need go no farther and you will report your answers to the Court. If you have answered both of the first two questions "Yes", you will go on to consider the remaining questions.]

Plaintiff's attorney objected to the format in which the questions of negligence and unseaworthiness and proximate cause were presented to the jury maintaining that two questions should be combined as one question as in the contributory negligence question. The question should have read as follows:

> Was the S/S STEELMAKER unseaworthy or was the Isthmian Lines, Inc., negligent, and if so was it the proximate cause of the accident and resulting injuries to plaintiff, Lugo?

In the alternative, plaintiff requested that the question concerning contributory negligence should follow in the same format and should have stated as follows:

(a) Was the plaintiff, Vicente Lugo, guilty of contributory negligence?

(b) If your answer to the aforesaid question is yes, was such negligence the proximate cause of the accident and resulting injuries to plaintiff, Vicente Lugo?

Instead, the Court set forth a special question as follows:

(a) Did the negligence of plaintiff, Lugo, contribute to the happening of the accident and his resulting injuries?

The manner in which the Court submitted this special verdict or questions to the jury, particularly when considered with the way the defendant's negligence or unseaworthiness and proximate cause were presented, was prejudicial to the plaintiff and in error in that it conveyed to the jury that the degree of defendant's negligence which was the proximate cause of the accident, was greater and different than that of the plaintiff, with respect to contributory negligence.

In addition to this, it helped cause what is an apparent inconsistent verdict.

8. The refusal of the Court to grant plaintiff's application for a mistrial in order to secure the testimony as to the amount of money that was paid as expenses and wages to David La France, a witness in the previous trial, was prejudicial and in error. Defendant's attorney was prepared to produce David La France, an eye-witness who testified in a previous trial as a witness in the present trial. However, defendant's counsel requested the Court to prevent plaintiff's attorney from asking him how much David La France was paid at the previous trial for his

expenses and wages. It was ascerta that the amount paid to David La France was $5,000. Plaintiff's attorney pointed out to the Court that this was a very unusual amount and certainly the jury was entitled to have this information in order to render a proper determination on the facts presented. Plaintiff's attorney requested a mistrial so this information could be secured and presented during the trial. This request was denied and the Court directed defendant's attorney either to produce the said witness, David La France, for purposes of cross-examination on this issue or, in the alternative, the Court would not permit defendant's attorney to read Mr. La France's testimony from the previous trial on the ground that plaintiff's attorney did not have the right to develop a full and complete cross-examination on this point. Defendant's attorney decided not to produce Mr. La France or even attempt to produce him and proceeded without the transcript of the previous trial of Mr. La France's testimony.

The administration of justice requires that these important and salient facts which go to the creditability and interest of David La France, which defendant considered to be a crucial and necessary witness, should have been presented to the jury.

The jury, in order to make a proper determination in this case, should have had this information presented to it. It is obvious that this crucial and important testimony may very well have affected and influenced the jury's verdict. The refusal of the Court to grant a mistrial on this point so that this information could be secured in a proper, ordinary manner, thwarted the administration of justice and deprived the plaintiff of a full and

complete trial of the issues.

WHEREFORE, for the reasons set forth herein, it is respectfully requested that this Court issue a finding that the jury's verdict pertaining to proximate cause was against the weight of the evidence as a matter of law, and that the defendant's negligence and unseaworthiness was the proximate of plaintiff's accident and resulting injuries; and that portion or part of the verdict of the jury pertaining to proximate cause be set aside, and that the Court enter judgment for a directed verdict or, in the alternative, for a judgment notwithstanding the verdict, or for a new trial, and for such other and further relief as to this Court may seem just and proper.

S/ ARTHUR ABARBANEL
Arthur Abarbanel

Sworn to before me this
16th day of July, 1975.

Notary Public

DAVID JAFFE
NOTARY PUBLIC, STATE OF NEW YORK
No. 31-7066200
Qualified in New York County
Commission Expires March 30, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

VICENTE LUCO,

Plaintiff,

-against-

ISTHMIAN LINES, INC.,

Defendant.

72 Civ. 3197

JUDGE FREDERICK VAN PELT BRYAN

PLAINTIFF'S REPLY AFFIDAVIT

- X

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

ARTHUR ABARBANEL, being duly sworn, deposes and says:

1. This affidavit is submitted in reply to the answering affidavit of the defendant herein, objecting to plaintiff's motion for directed verdict and for judgment notwithstanding the verdict or for a new trial.

2. In essence, defendant states on the first page of its memorandum of law, that plaintiff has brought up no factual issues within his affidavit in support of this motion. It would appear then, that defendant admits the truth of the factual allegations which plaintiff has set forth in detail on pages 2 and 3 of the affidavit dated July 16, 1975, in support of the motion, and also those allegations of fact set forth in his memorandum of law. When we refer to facts in this motion, we are referring solely to the facts pertaining to the proximate cause aspect. Since the jury found negligence and unseaworthiness, the aspects of these facts are not involved in this application.

3. There appears to be no dispute as to the law, but only as to how the law is applicable to the facts present in this case. Defendant does not dispute the law as set forth in Rogers v. Missouri Pacific Railroad Co. and Ferguson v. Moore-McCormack Lines, Inc., that is that the charge to the jury should include that if any negligence played any part, even the slightest, in producing the injuries or death, for which damages are sought, then you must find for the plaintiff. Defendant states that the Court's charge covered the Rogers and Ferguson charge, while plaintiff maintains this was not the case. If plaintiff's position is correct, then defendant concededly admits that it is prejudicial and reversible. (citation of cases cited herein are set forth in plaintiff's memorandum of law)

The charge with respect to proximate cause as set forth by the Court to the jury does not meet the tests of the Rogers and Ferguson cases, and the cases in the Second Circuit and other Circuits.

The charge with respect to proximate cause that the Court gave the jury was as follows:

> "What do I mean by proximate cause? Proximate cause means, in effect, a producing cause of the accident which resulted in the injury. It must be an unbroken chain of events or circumstances flowing from the unseaworthiness or the negligence, if you find there was such and leading to the accident. There must be a direct causal connection between unseaworthiness or negligence if you find any and the accident which caused the injuries.
>
> "The question is whether any unseaworthy condition of the vessel or any negligence on the part of the shipowner played any role in producing the accident which Lugo suffered and the injury which resulted from that accident. Thus, the second written question to be submitted to you is, "Whether or not unseaworthiness of the STEELMAKER or negligence of the defendant shipowners was a proximate cause of the accident and the injuries which the plaintiff suffered.'

"The burden is on the plaintiff to establish proximate cause by a fair preponderance of the credible evidence. Even if you find the vessel unseaworthy or the shipowner negligent, this does not establish liability on its part."

In the Tyree and Farnarjian cases, cited on pages 7 and 8 of plaintiff's memorandum of law, the courts held that when a traditional proximate charge is used, such as the case at bar, it leads to confusion by the jury and that the court should instruct the jury under the language of the Rogers and Ferguson cases, specifically, as to what degree of negligence is required to establish proximate cause. If the traditional proximate cause charge is not clarified to this extent, the courts have concluded in the cases cited, that the jury would be confused and this would result in inconsistent verdicts. This is exactly what occurred in this case, as a result of the charge.

The charge of the Court to the jury is replete with traditional proximate cause charges, with no explanation as to the degree of negligence which is required to establish proximate cause. Examples of these, are as follows (page numbers refer to the pages of the charge to the Jury):

On page 2, Line 18, the Court stated as follows:

"and secondly (as claimed by the plaintiff), that the Isthmian Lines was negligent and this negligence was a proximate cause of the injuries"

Page 2 and 3, lines 24 and 25, and lines 1 and 2:

"In addition, it asserts that any injuries received by the plaintiff were brought about in whole, or in part, by his own contributory negligence."

This clearly would convey to the jury that with respect to negligence, as claimed against the defendant, it has to be the sole cause, while it was clearly conveyed to the jury, that with respect to contributory negligence, it only has to be in whole or in part.

Page 4, Lines 10 through 12:

"Thus, the plaintiff has the burden of proving each of the elements of his case by a fair preponderance of the credible evidence."

This charge is not elaborated upon as should have been that plaintiff only has to show that negligence in any one element of his case and the slight degree of negligence required to prove such negligence. The jury thus would conclude from this charge, that the plaintiff would have to prove all of the elements of negligence and particularly when taken into consideration with that part of the charge of a "fair preponderance" that the degree of negligence is great and not slight or any part as set forth in the Rogers and Ferguson cases.

Pages 13 and 14 Line 25 and Lines 2 and 3:

"and whether, if there was unseaworthiness or negligence, either of those factors was a proximate cause of the accident to Lugo and the resulting injuries."

Again this conveys to the jury that the negligence has to be the sole cause, with no explanation as to the slight degree or smallest part of negligence required.

Page 19, Lines 23 through 25:

"There must be a direct causal connection between unseaworthiness or negligence if you find any and the accident which caused the injuries."

Page 20, Lines 2 through 6:

"The question is whether any unseaworthy condition of the vessel or any negligence on the part of the shipowner played any role in producing the accident which Lugo suffered and the injry which resulted from that accident."

Page 20, Lines 7 through 10:

"Whether or not unseaworthyiness of the STEELMAKER or negligence of the defendant shipowner was a proximate cause of the accident and the injuries which the plaintiff suffered."

Again there is no explanation of the slight degree of negligence required for each of the allegations of the element of negligence and conveys to the jury that the negligence has to be in whole, not to the slightest degree or smallest part, as required by the cases.

Page 20, Lines 11 to 13

"The burden is on the plaintiff to establish proximate cause by a fair preponderance of the credible evidence."

This with no explanation** and particularly when considered with the detailed explanation of what constitutes a fair preponderance, again would lead the jury to confusion as to what is required to establish the proximate cause of negligence as claimed and degree of it. It would convey to the jury that the negligence has to be the sole cause.

**as to the slight degree of negligence required to establish proximate cause

Page 20, Lines 16 through 20:

> "The question here, this second question, important as it is, is: 'Whether even if there was unseaworthiness or negligence, this was a proximate cause of the accident to the plaintiff and the resulting injuries."

Again, this over stresses and emphasizes the importance of proximate cause with no explanation as to the degree of negligence required to establish proximate cause.

The court then goes on to say on the same page 20, lines 11 through 25, as follows:

> "I may say to you that the question of causal relationship between the conditions which were found in the hold, whatever you found them to be, and the accident suffered by plaintiff Lugo, is of particular importance in this action and should be considered by you carefully."

This is an example of the Court reemphasizing the importance of proximate cause, with no explanation of the degree of negligence required or emphasis showing the importance of the slight degree of negligence, as required, to establish proximate cause.

It is obvious that with all of the emphasis on proximate cause and without a single explanation as to the degree of negligence, as required by the Rogers and Ferguson cases and other cases cited, in plaintiff's memorandum of law, that the jury could only come to one conclusion as to the degree of negligence required for proximate cause, namely, that it had to be the sole cause. The courts have held that this leads to confusion on the part of the jury, is reversible and results in inconsistent verdicts. This is what occurred in the case at bar.

In the Tyree case, the court stated that if the term proximate cause is used, that thenkit should be done in the contents of what has become known as the Mathes and Devitt instruction. This instruction is set forth on pages 8 and 9 of plaintiff's memorandum of law, and explains the degree of negligence required to establish proximate cause, and is as follows:

> "An injury or damage is proximately caused by an act, or failure to act, whenever it appears, from a preponderance of evidence in the case, that the act or omission played any part, no matter how small, in bringing about or actually causing the injury or damage. So, if you should find, from the evidence in the case, that any negligence of the defendant contributed, in any way or manner, towards any injury or damage suffered by the plaintiff, you may find that such injury or damage was proximately caused by the defendant's act or omission."
> 382 F. 2d at 526 (quoting from Morrison v. New York Central R.R.Co., 361 F. 2d 319, 320, (6th Cir. 1966) and citing Mathes and Devitt Federal Jury Practice and Instructions §84.12 (1965) (underlining supplied for emphasis)

It should have been explained to the jury that the test for proximate cause is, that if the employer's negligence played any part even the slightest in producing the injury or death for which damages are sought, then the jury must find for the plaintiff. This could have avoided the obvious confusion to the Jury.

The only explanation the Court gave with respect to proximate cause, was "the question is whether any unseaworthy condition of the vessel or any negligence on the part of the shipowner played any role in producing the accident which Lugo suffered and the injuries which resulted from the accident."

This does not meet the test of the various courts, including the Supreme Court.

With respectto the traditional proximate cause, as indicated on pages 13 and 14 of plaintiff's memorandum of law, in some cases it has been held that where such a charge has been given and explained by the words "whole or part", that this might possibly remedy the defect in the proximate cause charge. It is submitted, that although in describing negligence, where the courts have charged "The shipowner here may be liable for any injuries resulting in whole or part from negligence of its owner or employees and this includes plaintiff's fellow crew members aboard the vessel," this was not sufficient to cure the defect present. In the cases cited in support of such a proposition, this explanation was repeated and explained frequently, at other times and also specifically set forth in the special verdict. See Delima v. Trinidad, page 9 of plaintiff's memorandum of law.

The special verdict with respect to proximate cause, as submitted by this Court, was as follows:

> "2. If your answer to Question #1 is "Yes", was such unseaworthiness or negligence a proximate cause of the accident and the resulting injuries to plaintiff Lugo?"

Plaintiff objected to this special interrogatory. It should have read:

> If your answer to Question #1 is "Yes was such unseaworthiness or negligence in whole or in part a proximate cause of the accident and resulting injuries to plaintiff Lugo.

*In the case at bar, the Court did not use these words in its charge, but instead used the words "playedny role". This clearl does not meet the test.

and furthermore an explanation as to "whole or Part" should have been made to the Jury. This was not done in the Lugo case and resulted in an inconsistent verdict. It has been held that the words "whole or part" alone without any explanation, is confusing to the jury and leads it to the conclusion that it has to be the sole cause. See cases cited pages 13, 14, 15, 16 and 17 of plaintiff's memorandum of law.

Therefore, in refusing to charge the jury and to word the special verdict as requested by the plaintiff, concerning proximate cause and negligence, led to confusion by the jury and an inconsistent verdict resulted. This was prejducial and is reversible.

4. If this Court erred in failing to give the charges requested, then this is reversible and the relief requested, should be granted, regardless of what the facts were, as presented during the course of the trial, under the applicable existing law.

5 Even if the charge was proper, as defendant maintains, then under the existing facts produced and proven during the course of the trial, and the law applicable thereto, plaintiff's motion should be granted, because there were no facts set forth from which the jury could draw an inference which warranted their findings pertaining to proximate cause.

5. What defendant primarily is relying on in its objection to this motion, is that the jury can draw inferences from the facts in support of their verdict. There is no dispute as to this general proposition of law, but your deponent disputes the fact that there were any facts presented during the course

of the trial which would justify the jury drawing inferences in favor of the defendant.

As set forth in plaintiff's memorandum of law, in support of his motion, where the uncontradicted and overwhelming evidence is such, that such conditions caused the plaintiff's accident and resulting injuries, without any evidence to support inferences in favor of the defendant, then the relief requested by the plaintiff in the present motion, should be granted.

7. The following facts briefly set forth, are those solely pertaining to proximate cause which substantiate plaintiff's contention and were undisputed or uncontradicted:

(a) The air in the No. 2 hatch was hot, stale, musty, stuffy and humid at the time of the accident.

(b) The hatch had been closed for approximately 21 hours prior to the accident.

(c) The air was not circulated and unfresh.

(d) The ventilation system was not turned on at the time of the accident.

(e) The temperature inside the hatch was approximately 100° and the outside temperature was lower at approximately 90° with a strong sea breeze existing of five knots on the open deck.

(f) At the time of Mr. Lugo's accident and for some period prior thereto, he had been sweating excessively and had difficulty breathing because of the condition of the air in the hatch.

(g) Mr. Lugo took salt during his coffee break and changed his shirt because of the hot, humid condition in the hatch.

(h) Just prior to the time of his accident, Mr. Lugo, in addition to having difficulty breathing was gasping for breath, felt faint and dizzy.

(i) When he started to faint and lose consciousness due to the inadequate and improper lighting present, he had difficulty in seeing and could not control his fall because of this, even if his state of consciousness premitted him.

Reasonable inferences can only be drawn, when there are facts in support of them. When there are no facts presented in support of them, no inferences can be drawn by the jury and if they do, it is reversible.

On the facts set forth herein and during the course of the trial, the only reasonable inferences that can be drawn, after the jury found negligence and unseaworthiness, was that they were proximate causes of the accident. No facts were present to draw contrary inferences.

8. In its memorandum of law, defendant has set forth certain facts which were not proven as claimed, or substantiated during the course of the trial. The record, itself, and the facts produced at the trial naturally are controlling. However, your deponent will attempt to show the inconsistencies and unproven facts of defendant's contention:

(a) Defendant states that Mr. Lugo changed his shirt because of excessive sweating, prior to working in the hatch. The testimony was that he changed his shirt during the coffee break at 10:00 A.M., after having worked and sweated in the hatch from approximately 9:00 A.M. to just a little before 10:00 A.M.

(b) Defendant contends the record shows plaintiff was ill prior to his going into the hatch to do his work. There was no such proof submitted during the course of the trial. Plaintiff testified that he felt well prior to going into the h hatch.

(c) Defendant further states that plaintiff while employed aboard the S.S. Longview Victory, was unable to stand and perform his watch and because of that the jury could infer that plaintiff had a chronic endogenous condition, such as shortness of breath and sweating. The actual fact is the exhibit shows just the opposite, that there was no chronic endogenic condition such as shortness of breath or sweating. The report introduced shows that he had a cough and cold; that there was no shortness of breath or sweating, and that he was given aspirin tablets and cough syrup for the cold and cough. Attached hereto and made a part hereof, is a photostatic copy of Exhibit B, with the pertinent parts underlined for emphasis, in support of plaintiff s position.

Defendant would like the Court to believe that any minor, sporadic, erratic complaint constitutes a chronic endogenic condition. The facts, clearly, belie and contradict this point. Since there was no evidence introduced or proven on this point by the defendant, the jury had no facts upon which to draw any such inference.

(d) Defendant further states that plaintiff had defective vision, from which the jury could conclude that this caused the accident.

Plaintiff has testified and his records at the Seafarers Welfare Plan Medical Clinic, show that he wore glasses for reading purposes. Defendant would like to convey the impression that this constitutes serious defective vision. The actual fact or reality is that anytime one does not have 20/20 vision, that this is not normal or standard vision, but not considered a serious defect. The Court can take judicial note that people who wear glasses for reading purposes solely, without needing glasses for distance, do not have any serious eye defect nor are they required to wear glasses when walking or working. Such was the nature of Mr. Lugo's eye condition, wearing reading glasses for other purposes such as distance, could cause blurring and be hazardous.

Furthermore, and more important, is the fact that it is immaterial whether Mr. Lugo had a visual defect and was required to wear glasses, because it had nothing to do with the accident. The clear, uncontradicted testimony, is that he was standing still, sweating excessively, had difficulty breathing and was gasping for breath, when he started to feel faint and dizzy, and whether his vision was good or bad, this had nothing to do with the accident, since he was not moving.

9. Defendant relies on the case of Sotell v. Maritime Overseas Inc. 474 F 2,794 (2 cir. 1973) in support of its position. This merely states that a jury can draw inference on facts present or proven. In that case, there were facts present as to whether the valve was closed and how. It does not stand for the proposition that one can draw inferences on facts which are not present or uncontradicted, such as the case at bar. In our case, there were no facts or evidence present to substantiate defendant's position that plaintiff was chronically, inherently ill, and had something worng with him prior to entering the hatch.

10. Defendant maintains that since plaintiff's physician is an orthopedic specialist, he is not entitled to testify as to general, basic medical facts, which any doctor would know, as to causal relationship between the conditions that existed as claimed, causing the plaintiff to fall and sustain his injuries.

The mere fact that one specializes in a particular field of medicine, does not preclude him from testifying as to general, basic medical knowledge. All doctors, as part of their background and education, have to receive training in general medicine Thereafter, they then specialize. The fact that they specialize does not preclude them from testifying on general, basic concepts of medicine, which are readily available in the knowledge of all doctors. Therefore, it was erroneous to prevent Dr. Leo J. Koven from testifying as to the causal relations concerning conditions present and the resulting accident and fall

Although this was not binding on the jury, the jury was entitled to have this for whatever guidance and value it was worth.

It is equally important to note that the jury should have had this expert opinion before them. Particularly, when the Court charged that although the opinions of experts are not binding on the jury, they are allowed, if they wish, to take them into consideration as guidance on the evidence presented. The jury was deprived of this, as a result of the ruling of the Court.

11. With respect to the availability of David LaFrance, it is sufficient to state that defendant's position, that Mr. LaFrance was readily available to plaintiff, is not correct. It is obvious that David LaFrance was a hostile witness. Plaintiff maintained and claimed that he created the negligent and unseaworthy conditions. In addition to this, he was not amenable and available to plaintiff since he was outside of the jurisdiction of this court, particularly on such short notice.

With respect to the availability of David LaFrance, defendant alleges that LaFrance was readily available to the plaintiff.

The Court in its charge, stated on page 13, Lines 11 to 17, as follows:

> "I may say, in passing, that there is no evidence in that record as to the availability of any other witness to either party-- and I am talking now of LaFrance and Palmer. As far as the record shows here, both witnesses were equally available to either party and no inferences whatsoever can be drawn from anybody's failure to call them."

First of all, defendant's position that LaFrance was readily available to plaintiff is not correct. Furthermore, that aspect of the charge made by the court, as to availability to plaintiff, is also equally incorrect and is prejudicial. As argued in Chambers, LaFrance, was at Lacyville, Pennsylvania, and was not subject to the process of this Court, being beyond 100 miles, and was not available to plaintiff. Mr. LaFrance, was available to defendant and they had him subject to call, and he was willing to come and would have, if the defendant so requested. When the Court ruled that plaintiff's attorneys were entitled to cross-examine Mr. LaFrance on the amount he was paid as expenses to testify as a witness, in the previous trial, namely, which was the sum of approximately $5,000.00, then the defendant decided not to have Mr. LaFrance come in, even though they could have.

Your deponent, then requested the Court for a mistrial, for the purpose of arranging to complete a full and complete cross examination as to the payment of Mr. LaFrance's expenses to show that he was prejudicial, hostile and an interested witness. This was denied. Certainly it could not have been achieved from Friday night to Monday morning, in the two day recess over the weekend. It would have taken substantially much more time. It is obvious that LaFrance was a hostile, prejudiced and interested witness, as claimed by the plaintiff, and which information the jury was entitled to evaluate and decide.

Plaintiff claims that LaFrance created the negligent and unseaworthy conditions. In addition to this, he certainly was not readily amenable to the plaintiff voluntarily and on such short notice.

It is respectfully submitted that the Court erred in not granting a mistrial and in charging the jury as to the availability, as just stated, in the Charge.

WHEREFORE, for the reasons set forth herein and in plaintiff's moving affidavit, memorandum of law and papers, this Court should grant the relief requested by the plaintiff herein.

s/ Arthur Abarbanel
Arthur Abarbanel

Sworn to before me this
7th day of October, 1975

DAVID JAFFE
NOTARY PUBLIC, STATE OF NEW YORK
No. 31-7008150
Qualified in New York County
Commission Expires March 30, 1976

ETB

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

M-842

VICENTE LUGO,

Plaintiff,

72 Civ. 3197

-against-

ISTHMIAN LINES, INC.,

Defendant.

MEMORANDUM

BRYAN, DISTRICT JUDGE:

Plaintiff, Vicente Lugo, a seaman aboard the S.S. Steelmaker, sued Isthmian Lines, the owner of the vessel, for injuries suffered on June 1, 1972 when he fell into a deep tank on the vessel. He charged his injuries were caused by the unseaworthiness of the vessel and by negligence under the Jones Act, 46 U.S.C. §688 (1970).

A first trial of the action before Judge Levet ended in a mistrial on March 17, 1975 when the jury disagreed. Retrial began before me on June 24, 1975. On July 1, 1975 the jury returned a special verdict on written questions. The jury answered "yes" to the first question, "Was the S.S. Steelmaker unseaworthy, or was the defendant Isthmian Lines negligent?"

It answered "no" to the second question, "If your answer to question 1 is 'yes', was such unseaworthiness or negligence a proximate cause of the accident and resulting injuries to plaintiff Lugo?" It was therefore unnecessary for the jury to answer the three remaining questions as to the amount of damages, whether Lugo's own negligence contributed to the happening of the accident and, if so, the percentage by which his negligence contributed to the accident.

Plaintiff has moved pursuant to Rules 50 and 59, F.R. Civ. P., to set aside the jury's negative finding on the proximate cause issue; for a directed verdict or judgment N.O.V. in plaintiff's favor on that issue; or for a new trial. The grounds advanced in support of the motion are without merit.

I.

Plaintiff's initial contention is that the jury's verdict is inconsistent because, while the jury found there was unseaworthiness or negligence in answer to the first question posed to it, it found that such unseaworthiness or negligence was not a proximate cause of the accident, in answer to the second question.

Plaintiff had the burden of proving both (1) the unseaworthiness of the vessel or the negligence of the owner, and (2) that such unseaworthiness or negligence was a proximate

cause of the accident and injuries. These were separate and distinct issues. In re Marine Sulphur Queen, 460 F.2d 89, 99 (2d Cir.), cert. denied, 409 U.S. 932 (1972); Peymann v. Perini Corp., 507 F.2d 1318, 1324 (1st Cir. 1974), cert. denied, ____ U.S. ____, 95 S. Ct. 1572 (1975). The jury found, as it was entitled to do, that while the plaintiff had sustained his burden on the issue of negligence and unseaworthiness, he had failed to do so on the issue of proximate cause. The verdict is in no way inconsistent.

II.

Plaintiff also seems to contend either (i) that the evidence on the issue of proximate cause was so overwhelmingly in his favor as to entitle him to a directed verdict or a judgment N.O.V. on that issue or (2) in the alternative, that the verdict of the jury finding no proximate cause should be set aside as contrary to the weight of the evidence and a new trial granted.

As the Court of Appeals of this circuit recently stated, in Bernardini v. Rederi A/B Saturnus, 512 F.2d 660, 662 (2d Cir. 1975):

> Whether the motion is one to direct a verdict or to set aside a verdict which the jury has returned, the test applied by the court is the same. The evidence must be viewed in the

> light most favorable to the party other than the movant. The motion will be granted only if (1) there is a complete absence of probative evidence to support a verdict for the nonmovant or (2) the evidence is so strongly and overwhelmingly in favor of the movant that reasonable and fair minded men in the exercise of impartial judgment could not arrive at a verdict against him. [Citations omitted.]

Applying these standards to the motion now before the court, it is plain that there is no merit to the plaintiff's contention. The probative evidence before the jury included testimony as to the physical conditions in the hold and the manner in which the work was conducted, and as to plaintiff's excessive sweating and consumption of salt even before he began the task in the hold; his work in the hold for a considerable period prior to a coffee break without any manifest ill effects; his abrupt loss of consciousness shortly after the coffee break; his failure to complain about the lighting or ventilation in the working area; and his failure to wear his eyeglasses. From such evidence and the permissible inferences to be drawn therefrom, the jury could reasonably find that plaintiff's fall into the tank was due to his failure to take reasonable precautions for his own safety, or to some physical defect of which only he could be aware, or that it was purely accidental.

The finding of the jury that unseaworthiness or negligence was not a proximate cause of the plaintiff's accident has ample support in the record.

III.

Plaintiff next contends that the court's charge on the issue of proximate cause was erroneous because it did not use the precise language of Rogers v. Missouri Pac. R. Co., 352 U.S. 500, 506 (1957) on the subject. See DeLima v. Trinidad Corp., 302 F.2d 585, 587-88 (2d Cir. 1962); Farmerjian v. American Export Isbrandtsen Lines, Inc., 474 F.2d 361, 364 (2d Cir. 1973). The Rogers proximate cause test is

> simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. 352 U.S. at 506.

In the case at bar, after defining "proximate cause", the court charged:

> The question is whether any unseaworthy condition of the vessel or any negligence on the part of the shipowner played any role in producing the accident which Lugo suffered and the injury which resulted from the accident. (Emphasis added.)

"[A] trial judge is ... not required to deliver his instructions as to the law either in the specific words requested by the parties or in the exact language of any opinion." Halecki

v. United New York and New Jersey Sandy Hook Pilots Association, 282 F.2d 137, 140 (2d Cir. 1960), cert. denied, 364 U.S. 941 (1961); Oliveras v. United States Lines Co., 318 F.2d 890, 892 (2d Cir. 1963); United States ex rel. D'Agostino Excavators, Inc. v. Seyward-Robinson Co., 430 F.2d 1077, 1085 (2d Cir. 1970), cert. denied, 400 U.S. 1021 (1971). While the charge here did not adopt the precise language of Rogers, including the phrase "even the slightest", it correctly and clearly stated the law on the subject. Plaintiff's contention that the jury was not properly instructed on the issue of proximate cause is without merit.

IV.

Plaintiff next contends that the court's refusal to permit plaintiff's medical expert "to testify in response to a hypothetical question that the improper and inadequate ventilation present could medically and causally result in plaintiff's accident," was prejudicial error which requires the setting aside of the verdict and the grant of a new trial.

The determination of the qualification of a witness as an expert and the admission or exclusion of expert testimony are matters left to the broad discretion of the trial court. Salem v. United States Lines Co., 370 U.S. 31, 35 (1962); Tropea

v. Shell Oil Co., 307 F.2d 757, 763 (2d Cir. 1962); Spitzer v. Stichman, 278 F.2d 402, 409 (2d Cir. 1960). The objection to the hypothetical question posed by plaintiff's counsel to Dr. Koven was sustained in the exercise of that discretion.

Dr. Koven was an orthopedist. There was question as to his qualifications to express an opinion on the subject of whether conditions in the hold "could" cause a man to faint. Moreover, expert testimony on this subject was quite unnecessary. All of the facts as to conditions in the hold were before the jury. The jury was fully qualified to make an intelligent determination as to whether or not the conditions they found to exist could have caused plaintiff to faint. As stated in the Advisory Committee's note to Rule 702 of the Federal Rules of Evidence:

> "There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute." Ladd, Expert Testimony, 5 Vand. L. Rev. 414, 418 (1952). When opinions are excluded, it is because they are unhelpful and therefore superfluous and a waste of time. 7 Wigmore §1918.

In any event, exclusion of the Koven hypothetical testimony could not be so prejudicial to the plaintiff as to require a new trial.

V.

Plaintiff complains that he was not given an opportunity to cross examine David La France, a witness for the defendant at the first trial, as to the amount of money paid La France by the defense for his expenses and loss of earnings.

While La France was a witness for the defendant at the first trial, he did not testify at the second trial. He was not subject to subpoena since he was more than 100 miles away from this district. See F.R. Civ. P. 45(e)(1). The defense therefore sought leave to read into evidence La France's testimony in the first trial. The court sustained plaintiff's objection on the ground that restrictions had been placed on the cross-examination of La France at the first trial and the plaintiff had not had a proper opportunity to impeach him. The defense then indicated that it might be able to produce La France as a witness for the defense. At that point, the plaintiff moved for a mistrial or for leave to conduct unfettered cross-examination of La France on the subject of what inducements defendant had given him to testify. The court ruled, as the plaintiff had requested, that if La France took the stand, the plaintiff was entitled to cross-examine him fully.

After an ensuing weekend, the defense advised the court

that it would not attempt to call La France as a witness and La France did not testify. Thus, there was no occasion for the defense to cross-examine him or to impeach his testimony. Evidence as to any arrangements which defendant had made with La France to induce him to testify at the first trial was of no relevance to the issues before the court at the second trial.

What occurred with respect to La France was to the advantage, rather than the disadvantage, of the plaintiff since La France's previous testimony was distinctly favorable to defendant. Plaintiff suffered no prejudice because of the La France incident and was plainly not entitled to a mistrial.

VI.

Plaintiff's final argument that the court should have submitted to the jury a separate question as to whether, if it found plaintiff to be contributorily negligent, such contributory negligence was a proximate cause of the accident, is also without merit.

The jury never reached the fourth and fifth questions in the special verdict dealing with contributory negligence, since it had answered "no" to the second question as to whether unseaworthiness or negligence was a proximate cause of the accident. Thus, plaintiff's argument on this score is wholly academic.

In any event, the court charged that contributory negligence was want of ordinary care for his own safety on plaintiff's part, which was "a proximate cause of the happening of the accident." The fourth question in the special verdict which the charge posed to the jury at the conclusion of its instructions on contributory negligence was, "Did the negligence of the plaintiff Lugo contribute to the happening of the accident?" The charge on contributory negligence was correct and the form of the question in the special verdict on the subject was well within the discretion of the court under Rule 49(a), F.R. Civ. P.

Plaintiff's motion is denied in all respects. Judgment will be entered for the defendant.

IT IS SO ORDERED.

Frederick A. P. Bryan
United States District Judge

Dated: New York, New York
October 30, 1975

filed 10/30/75

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

VICENTE LUGO

Plaintiff

-against- : 72 Civil 3197 (FW73)

ISTHMIAN LINES, INC. : JUDGMENT

Defendant

- X

The issues in the above entitled action having been brought on regularly for trial, before the Honorable Frederick van Pelt Bryan, United States District Judge, and a jury, on June 24,25,26,27, 30 and July 1, 1975, and the Court having submitted the attached special questions to the jury, and the jury having answered the said special questions, and the jury thereafter having returned a verdict in favor of the defendant, and the plaintiff having moved pursuant to Rules 50 and 59, of the Federal Rules of Civil Procedure, and the Court thereafter on October 23, 1975, having handed down its memorandum opinion denying plaintiff's motion in all respects, and directing judgment to be entered in favor of the defendant, it is,

ORDERED, ADJUDGED and DECREED: That defendant ISTHMIAN LINES, INC., have judgment against plaintiff VINCENTE LUGO, dismissing the complaint.

Dated: New York, N.Y.
October 30 , 1975

Raymond F. Burghardt
Clerk

APPROVED:

Frederick v.P. Bryan
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

VICENTE LUGO,

Plaintiff,

72 Civ. 3197 (FvPB)

-against-

ISTHMIAN LINES, INC.,

Defendant.

- X

IT IS HEREBY STIPULATED AND AGREED, by and between the attorneys for the respective parties hereto, that the following documents shall be transmitted as the certified record on appeal from the final judgment against the plaintiff and the verdict and order upon which it is based, dismissing the complaint, entered in this action on the 30th day of October, 1975, and that all other papers shall be retained in the District Court:

1. Summons
2. Complaint
3. Answer of Defendant
4. Plaintiff's request to charge
5. Plaintiff's supplemental request to charge
6. Defendant's request to charge
7. Defendant's supplemental request to charge
8. All exhibits used during trial
9. Jury notes to court during trial before Judge Bryan
10. Copy of special verdict

11. Motion for directed verdict of the judgment notwithstanding the verdict or for a new trial

12. Defendant's answering affidavit

13. Plaintiff's reply affidavit

14. Memorandum decision of Judge Bryan dated October 20,1975

15. Judgment entered October 30, 1975

16. Transcript of record of trial

17. Plaintiff's notice of appeal to Circuit Court

DATED: New York, New York
December 17, 1975

SCHULMAN, ABARBANEL & SCHLESINGER

BY: _____
Arthur Abarbanel, Member of Firm
Attorneys for Plaintiff

KIRLIN, CAMPBELL & KEATING

BY: _____
Daniel J.Dougherty, Member of Firm
Attorneys for Defendant

Tr p. 42

Q When you signed aboard the SS Steel Maker, did you have what's known as pre-sign on or pre-employment examination?

A Yes, sir.

Q Who gave you that examination?

A The company doctor, Dr. --

Q Did you pass that examination?

Tr p. 48

Q What was the weather condition at that time?

A Hot.

Tr p. 50

Q When you got down into the lower hold in the area of the deep tanks, what was the condition of the hatch at that area?

A Dark, hot and humid.

Q What was the condition of the air?

A Stuffy and stale.

Tr p. 51

Q You already described the main deck level. Now the square of the hatch of the 'tween deck level, was that open or closed?

A Closed.

Vicente Lugo - plaintiff - direct

Tr p. 54

Q Will you describe the temperature in the hold?

A It was very hot.

Q How was it compared to the temperature outside on the deck?

A More hot.

Tr p. 62

Q Did you smell anything?

A Yes, sir.

Q What did you smell?

A Petroleum.

Tr p. 64

Q I show you a picture and ask you if that is a fair representation of how -- same concession, Mr. Dougherty?

MR. DOUGHERTY: May I see it? I have no objection.

MR. ABARBANEL: May we mark that as plaintiff's -- Plaintiff's Exhibit 2, your Honor.

THE COURT: All right.

MR. ABARBANEL: In eivdence.

(Plaintiff's Exhibit 2 received in evidence.)

Q Is this picture, Mr. Lugo, which is being shown to you, Mr. Lugo, a fair representation of how the number 2 aft port deep tank looked?

A Yes, sir.

Vicente Lugo - plaintiff - direct

TR p. 70

Q What were the weather conditions?

A Hot.

Tr p. 70

Q When you entered the hatch for the first time, was the ventilation system on in the hatch itself?

A No, sir.

Q Was the ventilation system on in the deep tanks?

A No, sir.

Q When you entered the hatch for the second time after coffee break, was the ventilation system on in the hatch?

A No, sir.

Q Was it on in the deep tanks?

A No, sir.

Tr p. 72

Q What was the condition of the air in the number 2 hatch at that time?

A Hot, humid, stuffy.

Tr p. 73

Q When you went into the hatch for the second time, was it hot?

A Yes, sir.

Vicente Lugo - plaintiff - direct

TR p. 76

Q About how long had you been working from the time you entered the hatch up until the time of the accident?

A Ten or 15 minutes.

Q During this period of time did you have any difficulty working?

A Yes, sir.

Q What was the difficulty you had?

A Breathing, it got pretty hot.

Q In the morning prior to coffee break while you worked in the hatch did you have any difficulty working?

Tr p. 77

A Yes, sir.

Q What was the difficulty you had?

A Sweating and breathing.

Q Whey you say breathing, what was the difficulty you had with breathing?

A I was -- I started to breathe in air hard, and --

Q Now do you know when the number 2 hatch was last opened prior to the day of your accident?

A Yes, sir.

Q When was it?

A The day before.

Q Where was the ship at that time?

A In Guam.

Q How long had that hatch been closed prior to your accident?

A 18 or 20 hours, sir.

Vicente Lugo - plaintiff - direct

Tr p. 83

Q At the time you had your accident, where were you standing?

A I was standing on the narrow ledge on the port deep tank.

Tr p. 83

Q At the time you had your accident, where were you standing?

A I was standing on the narrow ledge on the port deep tank.

Tr p. 86

Q Mr. Lugo, tell us in your own words, how did your accident happen?

A After we started to work, I started sweating again and feeling weak and dizzy, and I feel like my breath was leaving me. I started to faint, I looked for something to grab, and was a little dark, plus there was nothing to hold, just empty space.

Q Then what happened?

A Then I fell.

Q Where did you fall, Mr. Lugo?

A Inside the port tank.

Tr p.88

MR. ABARBANEL: Yes, your Honor.

Q Would you describe the ledge or place you were standing at the time of the accident?

A About eight or ten inches wide.

Q What direction were you facing at the time of the accident?

A Aft.

Q And where was the light that was at the forward ladder?

A Forward.

Q With relation to where you were standing, was it in front or behind you?

A It was behind me.

Q The two tanks behind you, were they covered or uncovered?

A Yes, sir, they were covered.

Q The two tanks that were in front of you, were they covered or uncovered?

A Uncovered.

Q How were you feeling just prior to the time you had your accident?

A I was feeling all right.

Q At the time of your accident, how were you feeling?

A I wasn't feeling good there.

Vicente Lugo - plaintiff - direct

Tr p. 89

Q In what way weren't you feeling good?

A I was weak, dizzy, and --

MR. DOUGHERTY: If your Honor please, it's already been asked and answered.

THE COURT: All right, I will allow it.

Q You may continue, Mr. Lugo.

A Dizzy and losing my breath.

Q In your opinion, what caused you to fall?

MR. DOUGHERTY: Objection.

THE COURT: In your opinion?

MR. ABARBANEL: Yes.

MR.DOUGHERTY: Objection.

THE COURT: Objection sustained.

Q Do you know what caused you to fall?

A Yes, sir.

Q What was it?

A Unconsciousness.

Q Do you know what caused you to become unconscious?

MR. DOUGHERTY: Objection.

THE COURT: Ask him if he knew. Do you know?

THE WITNESS: The lack of air.

THE COURT: All right.

THE WITNESS: I had difficulty breathing.

Q As soon as the jury is through looking at this exhibit,

Vicente Lugo - plaintiff - direct

Tr p.111

Q What was the condition of your health prior to the accident of June 1, 1972?

A Good.

Tr p. 112

Q Did you ever suffer from blood pressure?

A No, sir.

Q Did you suffer from any heart disorder?

A No, sir.

Vicente Lugo - Plaintiff - Cross

Tr p.164

Q Then you went on your coffee break, am I right?

Tr p. 165

A You are right.

Q And was it at this time that you went to your room and changed your shirt?

A Yes, sir.

Q Or was it earlier that day?

A No, it was at that time.

Q At that time you went to the room and changed your shirt.

A Yes.

Q All right. Then you went to the mess hall for coffee?

A Correct.

Q And you sat in the mess hall with Palmer and LaFrance, didn't you?

A No, sir.

Q You had coffee with Palmer and LaFrance?

A No, sir.

Tr p. 171

Q That's true. All right. There was no reason that had anything to do with the structure of the ship why you couldn't have just sat down (indicating sitting down backwards) on top of that tank top, was there?

MR. ABARBANEL: I object to the form of the question.

THE COURT: Overruled.

A When you are losing your consciousness, you don't have that ability to think or look for -- you just --

Tr p. 172

Q Is there any reason you couldn't, based on the way the ship is built?

A Like I told you, I was losing my -- I don't know how to put that -- consciousness, and I don't have the ability to think where to sit or where to run or where to stand. I just --

Q You just lose your balance?

A Stand over there --

THE COURT: Let him finish.

A I just stand over there like paralyzed, unable to think or do anything.

Q You felt dizzy and lost your balance and fell, am I right?

A No, sir.

Q Excuse me?

A I start losing my breath, and my consciousness, and I fell.

Vicente Lugo - Plaintiff - Cross

Tr p. 280

Q You did not slip or trip on anything, did you, sir?

A I answered that a hundred times before, no. The answer is no.

Q And you were not walking around at the time of the accident, were you, Mr. Lugo?

A No, sir.

Tr p. 282

Q Now, sir, you testified that as you began to feel dizzy, there was nothing to hold on to. Now, Mr. Lugo, is it not a fact that you would not expect that there would be anything to hold on to at that area?

A It is a fact that if I expect to fall, I won't do it.

Q Is it not a fact that you would not expect to have anything to hold on to, sir, at that point?

A When you lose your senses, you don't expect anything or remember anything or -- that is not voluntary action. When you fall even into empty space you try to get hold of something.

Vicente Lugo - plaintiff - Redirect

Tr p. 301

Q I refer to Defendant's Exhibit B, which is the medical log for SS Longview Victory, and it states under treatment, alongside your name, it says, "Reported 1845 reported that he had a cold and that he was coughing, also that he had a headache. Given several aspirin tablets to take two every four hours. Also some cough syrup."

Does this refresh your recollection as to whether you had a cough or cold aboard the Longview Victory?

A Maybe. It happened a long time ago. I don't remember it. It could be.

Tr p. 307

Q Why did you take table salt on the day of the accident?

A I was sweating a lot.

Jose Gomez - Direct

Tr p. 329

"Q When you say you were in there during the day -- the day before, do you mean the day before the accident?

"A Yes.

"Q And was the hatch covered at that time?

"A Oh, yes.

"Q Will you describe at that time what the condition of the area in the hatch was?

"A Well, I would say it was a little musty and hot.

Tr p. 334

"Q Now at the time of the accident, were the blowers or ventilation system on in the after deep tanks?

"A No.

"Q How long had they been off?

"A To my recollection, since the removal of

Tr p. 337

"A Yes.

"Q At the time of the accident, were the ventilation blowers on in the number 2 hatch?

"A No.

"Q How long had that system been off?

"A Ever since the removal of the cargo back in India."

Jose Gomez - Direct

Tr p. 338

"Q What was the temperature, the outside temperature at the time of the accident?

"A In the nineties, I guess.

"Q With the number 2 hatch being covered at the time of the accident, what would be the temperature that hatch?

"A I would think it would be warmer down there.

"Q Was there any way any fresh air got into that hatch while it was covered?

"A No.

Tr p. 356

"Q While you worked in the number 2 hatch in the deep tanks while it's covered, what effect do the conditions that exist there have upon the body?

"A You could start sweating down there; after you stay there for awhile it gets kind of wet in there.

"Q Wet from what?

"A From the heat."

Tr p.225
Q Doctor, assume that one would have to work in a hatch

Tr p. 226
which had stale and uncirculated air --

MR. DOUGHERTY: I object, your Honor.

THE COURT: Objection sustained. Covered.

MR. ABARBANEL: Not with the doctor, your Honor.

THE COURT: No, you covered it with the question of the effect it has on his ability to work. That is all there is going to be on this subject.

MR. ABARBANEL: May we approach the Bench, your Honor

THE COURT: Come forward around here.

(At the side bar)

MR. ABARBANEL: Your Honor, this has not been covered. What I am about to ask the doctor is can improper ventilation and stale and uncirculated air and in a hot place cause one to faint.

THE COURT: Objection sustained.

MR. ABARBANEL: On what basis?

THE COURT: Objection sustained, period.

(In open court)

Q Doctor, what occurs to the body when one faints?

MR. DOUGHERTY: Same objection.

THE COURT: No, I will allow that question.

A There is a loss of muscle tone and support causing the body to become limp and fall downward.

Tr p. 227

Q Can one control the motion of the body when that occurs?

MR. DOUGHERTY: I object.

THE COURT: Objection sustained.

Q What effect does that have upon the control of the function and use of the body?

MR. DOUGHERTY: I object.

THE COURT: Sustained.

Q What causes one to faint?

MR. DOUGHERTY: I object.

THE COURT: Sustained.

MR. ABARBANEL: Your Honor, may I have the basis of the objection for the record?

THE COURT: I have ruled. Next question.

Tr p. 227

Q Can improper ventilation cause fainting?

MR. DOUGHERTY: I am --

Tr p. 228

THE COURT: Sustained. Now look, we're going to leave this subject. I don't want any more questions on it.

Captain Frank Si a - Direct

Tr p. 382

"Q I show you a photostatic copy of the deck log for June 1, 1972, and ask you if you can tell us what the temperature was on the day of the accident in the morning."

MR. DOUGHERTY: What time?

MR. ABARBANEL: As recorded in the log at the time recorded in the log for the morning.

"A Eight o'clock, it looks like about 83 degrees.

"Q And what about the next temperature?

"A 90 at twelve."

Chief Mate Robert Minor - Cross
Defendant's witness

Tr. p 519

Q Yes, and then it says, "And covering hatch." Does that mean they started to close the hatch up?

Tr p. 520

A Yes.

Q That was at 1:35 p.m. on May 31, 1972?

A Yes.

Exception to Charge

Tr p. 753

that will be covered in my unseaworthiness charge.

Four, any comments on four?

MR. DOUGHERTY: I think that is going to be covered in the charge.

THE COURT: The point is, it will not be in there unless I hear from Mr. Abarbanel, and I tell Mr. Abarbanel when he calls me whether I will take his suggestion or not. You are just talking about negligence here, and we are going into negligence if we have to, if I decide we should.

Five, five and six, all this stuff will be covered in negligence if I give a negligence charge.

Same with six. The same with seven. I don't see any reason to give eight except insofar as it is covered in the general definition of unseaworthiness. Witness testimony of experts will be covered in the usual charge by me. We won't have 10, That is out.

11, that will be covered --

MR. ABARBANEL: When you say 10 is out, is that because in the event your Honor merges the negligence and unseaworthiness?

THE COURT: In other words, if I am discussing negligence I will discuss negligence. I don't see that this adds or subtracts anything very much.

MR. ABARBANEL: For the purposes of the record since

Tr p. 754

I don't know my decision, may I have an exception, [illegible] to the previous ruling, as to negligence. May I have that as a standard exception to all those charges, to avoid duplication?

THE COURT: Yes.

11 is denied, certainly as it is posed. It will be covered.

MR. ABARBANEL: Exception.

THE COURT: 12 will be covered if we are going into the two questions.

MR. ABARBANEL: Again, I do not accept it because I have that standard exception.

THE COURT: 13 is denied except insofar as it is covered in the previous. This will be covered in seaworthiness. It is largely duplicative anyway and if you are going to put in anything about negligence, we will do it. Negligence I will define if I am going to use it.

So much for 15. Same thing as to 16. I will be covering it in my negligence charge.

17 I will be covering the subject matter in the unseaworthiness charge. Same thing as to 18. Since I am going to ask questions, specifically questions with respect to contributory negligence, if any, and if there is any, the percentage of contributory negligence, this will all be covered. It won't be covered this way because the questions

Exception to and request on wording of special verdict and proximate cause

Tr p. 755

MR. DOUGHERTY: Bernardini came to the conclusion it did because of the inconsistency in the jury's finding between negligence and unseaworthiness. And I would suggest this, your Honor, that question number one could be, was the SS Steel Maker unseaworthy or was the defendant negligent. Question number 2, if the answer to number one is yes, was such unseaworthiness or negligence a proximate cause? Question number 3 then would follow your form.

MR. ABARBANEL: I would object to that. I think that causes too much confusion. I think the way your Honor has it is adequate and less confusing and complies with the law.

MR. DOUGHERTY: Your Honor, the plaintiff wants the grammatical advantage that he sees in question number one. Question number one carries an implication that there is an underlying unseaworthiness and that the jury ought to focus on proximate cause.

MR. ABARBANEL: I can argue that you want to take advantage of language too. That doesn't lead to any good.

THE COURT: This won't get us anywhere. I will consider these questions and let you know tomorrow.

MR. ABARBANEL: Thank you, your Honor.

Exception to Special Verdict #2

Tr p. 760

MR. ABARBANEL: Your Honor, if I may be heard?

THE COURT: Yes.

MR. ABARBANEL: Your Honor, I object to the verdict item 2 on the following ground: That this creates an unfavorable air or position towards the plaintiff in that actually it is one item. It should read, "Was the SS"STEEL MAKER" unseaworthy or was the defendant, Isthmian Lines, negligent, and if so" -- not "if so" -- and was it the proximate cause of the accident and injuries resulting to plaintiff Lugo.

By delineating it, what you are doing is putting not only complexity on the issues for the jury, but you are giving the jury a further impression that it is not part of the same incident. If this is correct, then I take this position with respect to the contributory negligence because what's good with respect to the negligence is equally the same with respect to contributory negligence, and the charge then should read, was Mr. Lugo guilty of contributory negligence.

And a separate item should be, and if he was guilty of contributory negligence, was it the proximate cause of the accident and the resulting injuries to Mr. Lugo. Because certainly he may be guilty of negligence, but it may have nothing to do with the cause of the accident.

761

Tr p. 761

THE COURT: All right. The request is denied. The questions will be submitted. You may have an exception.

MR. ABARBANEL: Exception, your Honor.

THE COURT: Anything further?

All right, we will go right ahead.

(Discussion off the record.)

(End of robing room discussion.)

Propose wording of Special Verdicts by Court before change and discussion regarding them

Tr P. 751

THE COURT: We shall see. We go to questions for the jury. The questions that I propose to ask will run this way:

This is on the assumption that I am going to charge solely on unseaworthiness. Was unseaworthiness of the SS Steel Maker a proximate cause of the accident and the resulting injuries to plaintiff Lugo? Answer yes or no.

If you have answered the first question no, you need go no further and report your answer to the court. If you have answered the first question yes, you will then go on to consider the remaining questions.

2: Did negligence of the plaintiff contribute to the happening of the accident and the resulting injuries?

3: If your answer to question 2 is yes, to what extent, expressed in terms of percentage did the negligence

Proposed wording of Special Verdict by Court before change and discussion regarding them

Tr P. 753

THE COURT: I haven't any idea. I would doubt it.

MR. DOUGHERTY: Your Honor, ordinarily the questions start out "Do you find that the SS Steel Maker was unseaworthy," and then number 2, so, do you find that the unseaworthiness was a proximate cause.

THE COURT: I know. That can be split up. But I don't usually do it that way.

MR. ABARBANEL: What was the way you suggested? Was the unseaworthiness of the SS Steel Maker a proximate cause --

MR. DOUGHERTY: No, number 1, do you find that the SS Steel Maker was unseaworthy? And number 2, if the answer is yes, do you find that the unseaworthiness was a proximate cause. Because there is the possibility here that they could find no onproximate cause, even though they found unseaworthiness. For example, if they found that the ventilation or the lighting was inadequate, they might still find the proximate cause of the accident was Mr. Lugo's own inattention or eyesight or failure to simply sit down. They could find unseaworthiness.

THECOURT: It really doesn't make much difference. I like to have as few questions for the jury as I can.

MR.ABARBANEL: The more questions you have the more complicated it becomes.

Tr p. 754

MR. DOUGHERTY: Question number 2 seems to imply a sub situation of unseaworthiness and the focus is on proximate cause, rather than on unseaworthiness.

MR. ABARBANEL: I think that only confuses the jury. In my own opinion, the way you have it worded is proper.

THE COURT: I will think it over and let you know.

MR. ABARBANEL: Except that I am almost certain that I want unseaworthiness and negligence in the charge. I will try to look that up, but that is my position. I will give you a direct answer and not delay matters.

THE COURT: I take it from what you said, Mr. Dougherty, if Mr. Abarbanel takes that position you would like a negligence charge too.

MR. DOUGHERTY: Yes.

THE COURT: Then we'll charge on both negligence and unseaworthiness and let the chips fall where they may.

MR. ABARBANEL: I have no objection to this question, was either negligence or unseaworthiness a cause of the accident. In the charge I'd like them to be separate.

THE COURT: It was something you suggested I think, Mr. Dougherty, originally, that should be a question.

MR. DOUGHERTY: About what, proximate cause?

THE COURT: No, about in the single question to the jury that seaworthiness and negligence may be combined.

Portions of charge on proximate cause

Tr P.828

and his injuries; and secondly, that the Isthmian Lines was negligent and this negligence was a proximate cause of the injuries.

Tr p.830

Thus, the plaintiff has the burden of proving each of the elements of his case by a fair preponderance

Tr p. 836

Lugo contends that he did not, himself, do

Tr p. 837

anything to cause the accident to happen and that it was the failure of the defendant shipowner, acting through his officers and employees in supervisory positions aboard the STEELMAKER, to take proper precautions to provide proper light and proper ventilation, which brought about his fall.

Tr p. 839

were not reasonably safe working conditions; and whether,

Tr p. 840

if there was unseaworthiness or negligence, either of those factors was a proximate cause of the accident to Lugo and the resulting injuries.

Tr p. 843

Lugo's claim is that because of poor ventilation and poor lighting in the No. 2 hatch, the STEELMAKER was unseaworthy because the hatch where he was sent to work was unsafe and not reasonably fit for its intended use.

Tr p. 844

theory of liability, that is negligence, the plaintiff must prove by a fair preponderance of the credible evidence, that a reasonably prudent shipowner or his reasonably prudent employees aboard ship in the exercise of reasonable care would not have permitted Lugo to work under the

Tr p. 845

conditions of ventilation and light which you have heard described here.

Tr p. 845

As I told you earlier, I am going to submit to you a series of questions in writing for you to answer, and I will review these questions completely with you at the end of this charge:

The first question you will be asked to answer, and I am quoting, "Was the S.S. STEELMAKER unseaworthy or was the defendant, Isthmian Lines, negligent?" This question, of course, is with respect to the conditions of the No. 2 hatch at the time the accident occurred. You will be asked to answer that question yes or no. If you answer the question no, you will go no farther and report your answer to the Court. If the answer to that question is yes, you then go on to the second question which is the question of proximate cause.

What do I mean by proximate cause? Proximate cause means, in effect, a producing cause of the accident which resulted in the injury. It must be an unbroken chain of events or circumstances flowing from the unseaworthiness or the negligence, if you find there was such, and leading to the accident. There must be a direct causal connection between unseaworthiness or negligence if you find any and the accident which caused the injuries.

Tr p. 846

The question is whether any unseaworthy condition of the vessel or any negligence on the part of the shipowner played any role in producing the accident which Lugo suffered and the injury which resulted from that accident. Thus, the second written question to be submitted to you is, "Whether or not unseaworthiness of the STEELMAKER or negligence of the defendant shipowners was a proximate cause of the accident and the injuries which the plaintiff suffered."

The burden is on the plaintiff to establish proximate cause by a fair preponderance of the credible evidence. Even if you find the vessel unseaworthy or the shipowner negligent, this does not establish liability on its part.

The question here, this second question, important as it is, is: "Whether even if there was unseaworthiness or negligence, this was a proximate cause of the accident to the plaintiff and the resulting injuries."

I may say to you that the question of causal relationship between the conditions which were found in the hold, whatever you found them to be, and the accident suffered by Plaintiff Lugo, is of particular importance in this action and should be considered by you carefully.

Court charge re negligence

Tr p. 865

. . . Of course, we are talking about negligence in connection with conditions to the hatch and unseaworthiness with respect to conditions in the hatch. You answer that

Exceptions to all requests to charge that are denied

TR p. 870

You may have another.

MR. DOUGHERTY: May I have exceptions to all these requests that I have asked for now?

THE COURT: I have given anybody an exception to any request to charge I have thus far denied.

Exceptions to proximate cause charge

Tr p. 872

MR. ABARBANEL: I respectfully except. With respect to proximate cause, in view of the fact that I have excepted to the verdict, I respectfully request the Court to charge that in order for the contributory negligence to go to the dinishing or barring of any recovery it would have to be shown by the defendant that the contributory negligence was a proximate cause of the accident.

THE COURT: I already so charged and I refuse to charge further on that subject.

MR. ABARBANEL: I respectfully except.

Portions of summation of Defendant

Tr p. 781

they weigh tons, heavy winch-power to lift this solid metal tank cover or tank top. It's all solid metal behind him. He could have stepped back, this is all solid place behind him; if he didn't feel well, he could have sat down. He didn't have to stand near the edge. He had completed handing the top to Mr. LaFrance. There is no claim now that the plaintiff slipped or tripped. He wasn't walking around. There is no claim of that.

After the accident the captain came down into the hatch and he testified now as follows. First of all, he was notified of the accident and he was notified of the accident by David LaFrance, which means that LaFrance had to come up out of the hatch, go up on the main deck and notify the captain.

Then, the next day the captain did, he said, when I got as far as the hatch I turned around, went up to the bridge and told them to slow the ship down. Now, then after that, he came down to the No. 2 hatch. So all that time had elapsed.

In the meantime you recall the testimony of the chief officer that by the time he got there both lights were now down in the tank to assist Mr. Lugo. And you therefore have a distinct change in conditions.

"Q Now" -- this is on page 24, to the captain:

Tr P. 782

"Q What did you do then?

"A As soon as I got down to the 'tween deck le l I walked back, I looked down and asked LaFrance, who was there, LaFrance meantime had come back down, asked him what happened.

"Q What did he tell you?

"A He said they were working taking ventilator planks off the deep tanks to the starboard side on the deep tank of the starboard side, and there was Palmer. Palmer was down there at the bottom of the tank. LaFrance was down on the top of the 'tween deck level and Lugo was standing. He pointed to the area fairly close to him just standing there at that point. He said after he finished lowering the plank he got up, turned around to face Lugo, and Lugo just toppled into the tank.

"Q After he told you this, what did you do?

"A I turned around, observed the area and told him to get up on deck, get the man out, start opening the hatch in preparation to evacuate Lugo. Also to get some more light into the area.

"Q Why did you tell him to get more light? This now is long after the accident when the yellow light had been moved.

"A Well, when you have an accident people tend to

Verdict of Jury

Tr p. 882

THE CLERK: Mr. Foreman, have you agreed on a verdict?

THE FOREMAN: Yes, we have.

THE COURT: Obviously the verdict follows the question, does it, that I asked?

THE FOREMAN: Not precisely, your Honor.

THE COURT: I see. What, for instance, is your answer to Question No.1?

THE FOREMAN: Our answer is that is yes.

Tr p. 883

THE COURT: What is Question No.2?

THE FOREMAN: The answer to that is no.

THE COURT: Is no?

THE FOREMAN: That's correct.

THE COURT: Then that is it.

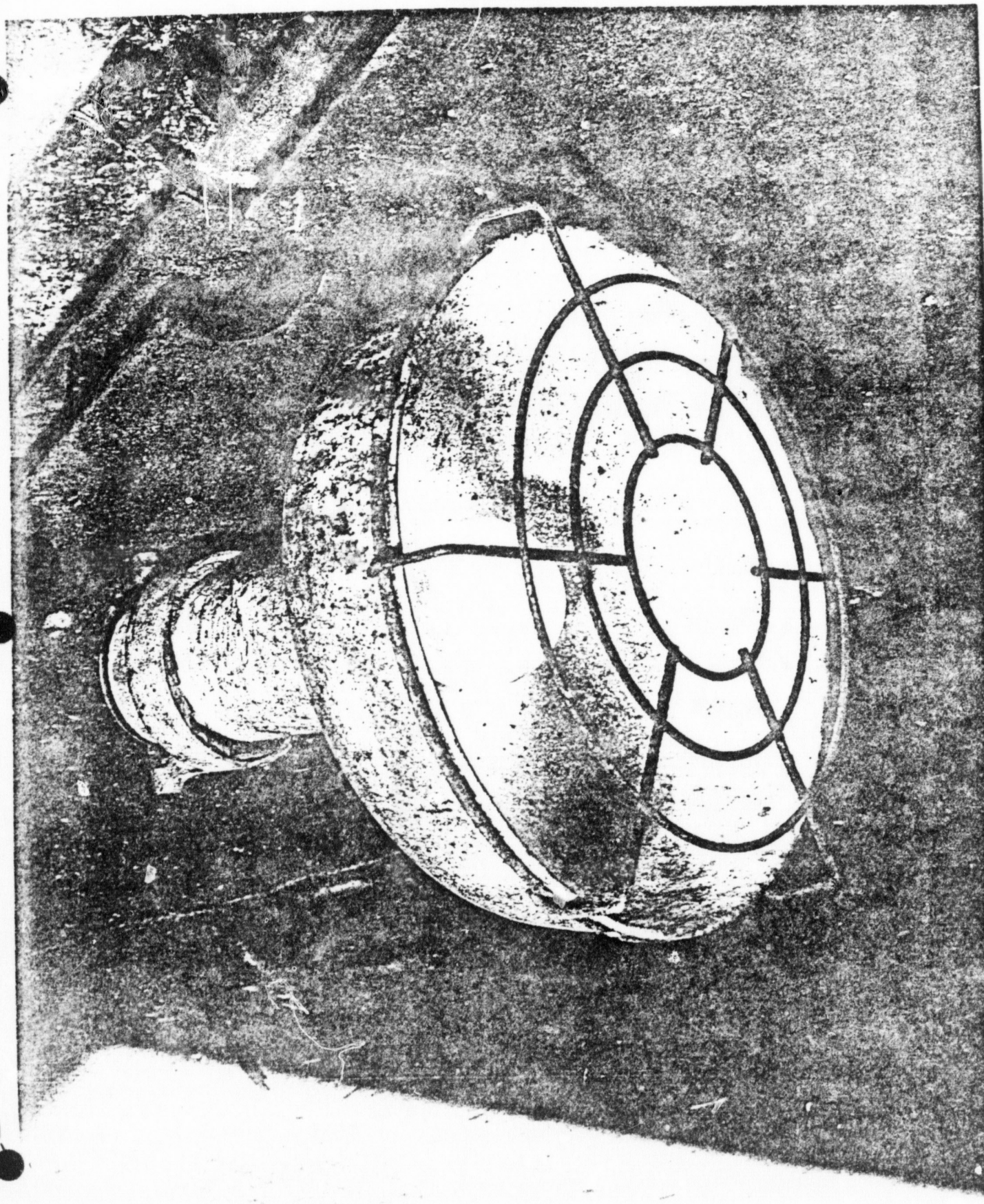
THE FOREMAN: That is it.

THE COURT: All right. Thank you very much. Now, may I ask you, was that a unanimous verdict?

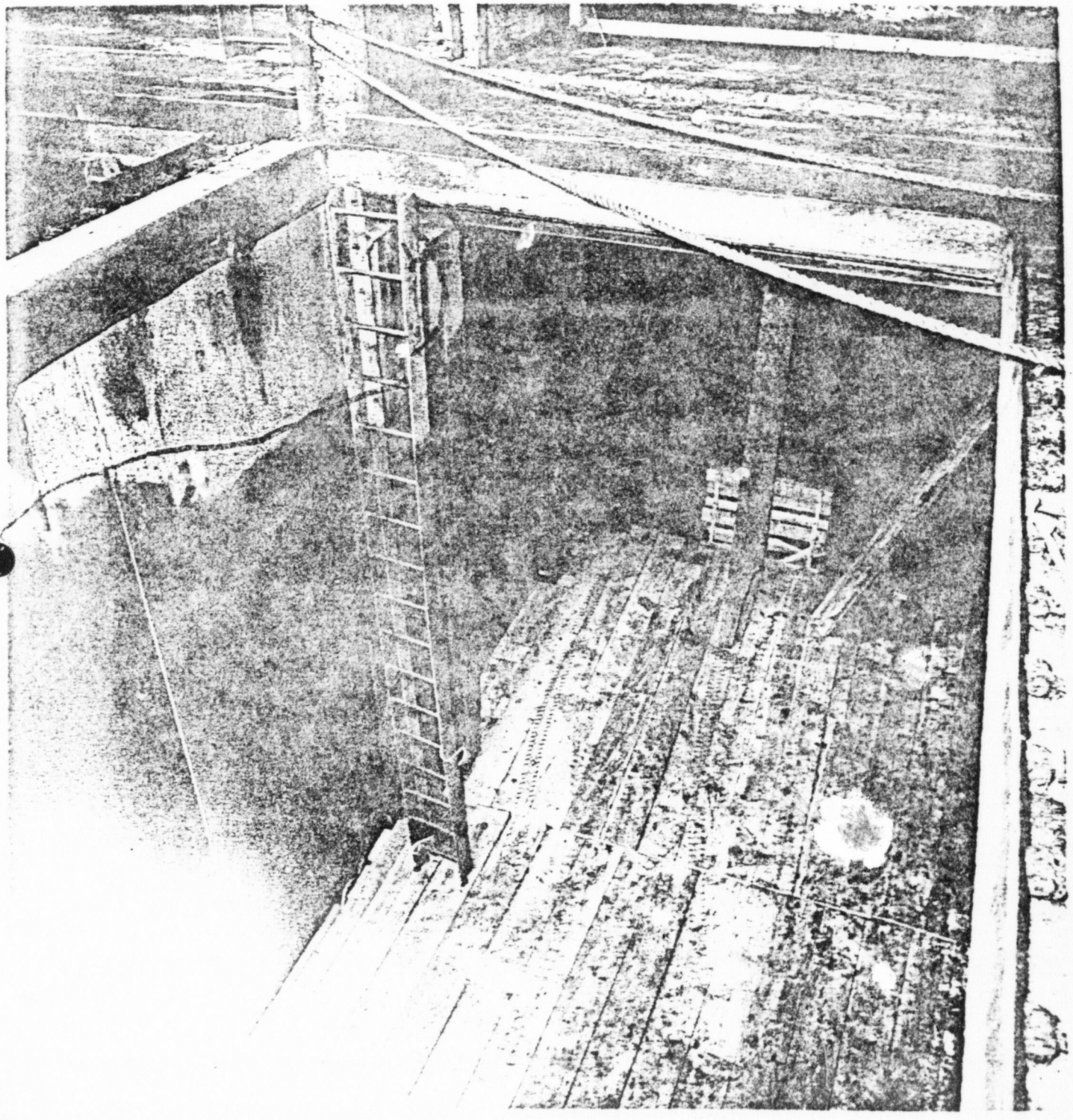
THE FOREMAN: To this first question, not to the second one.

THE COURT: The first question was unanimous, the second question was five out of six?

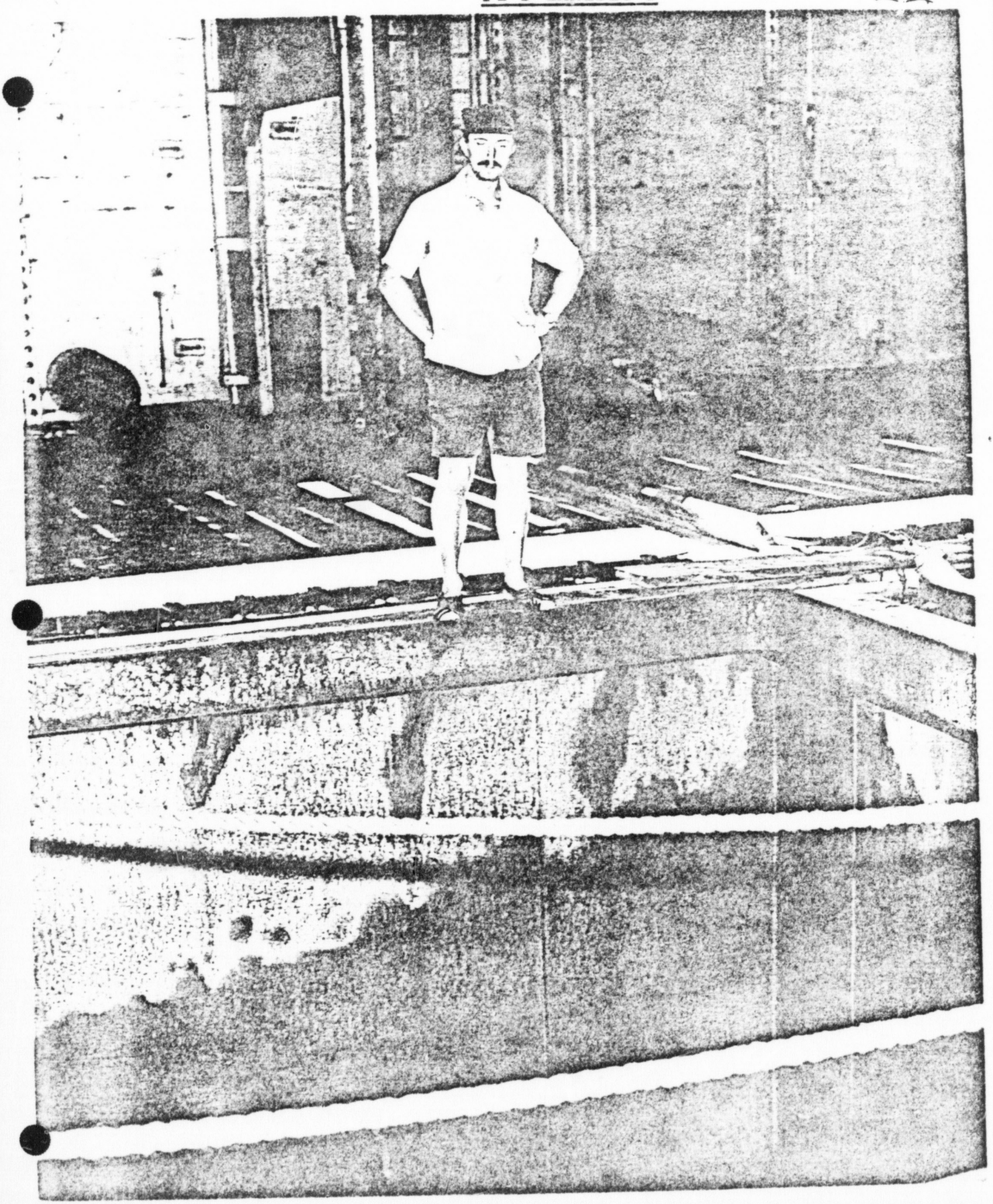
Pl's Exhibit 1



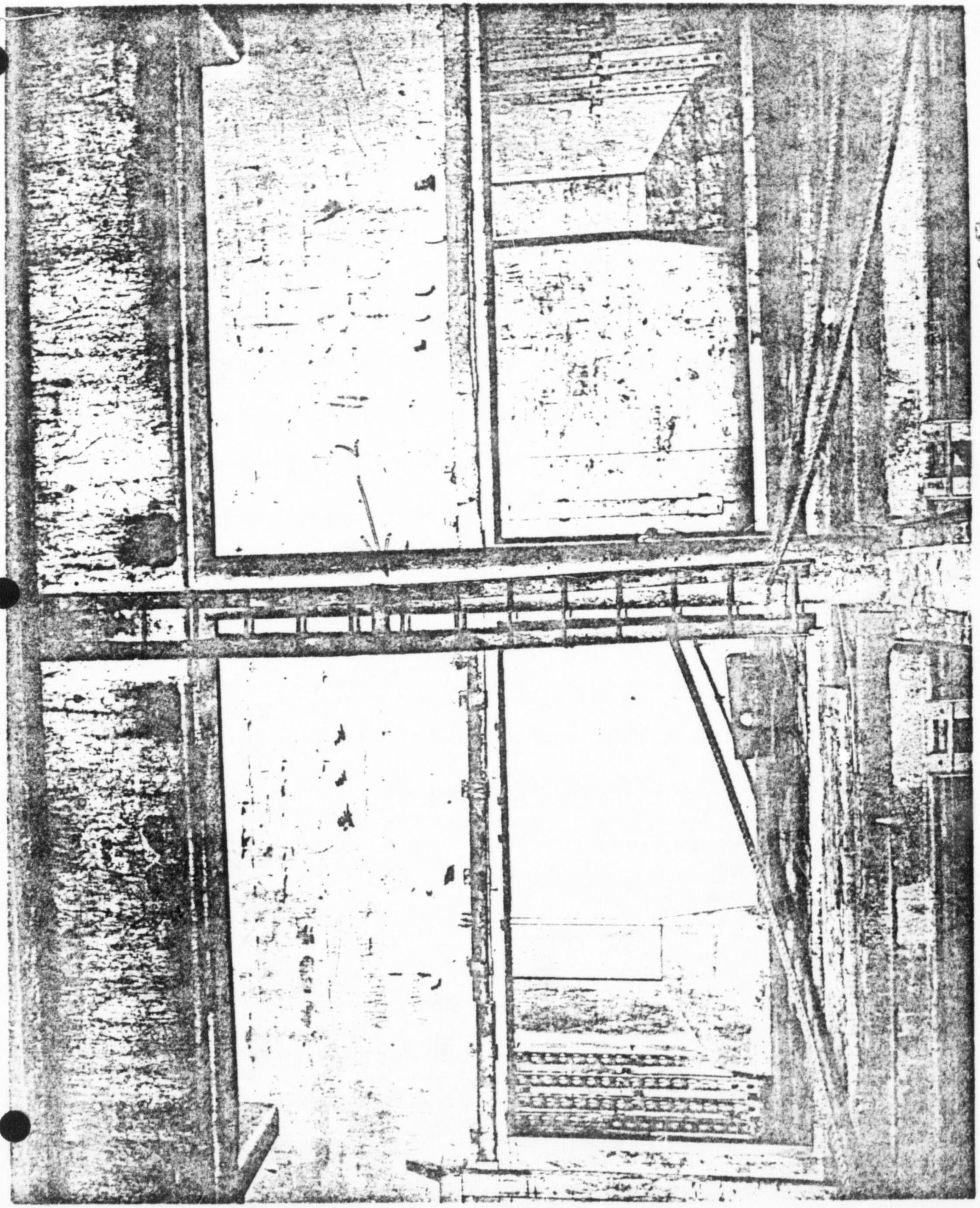
Pl's Exhibit 2



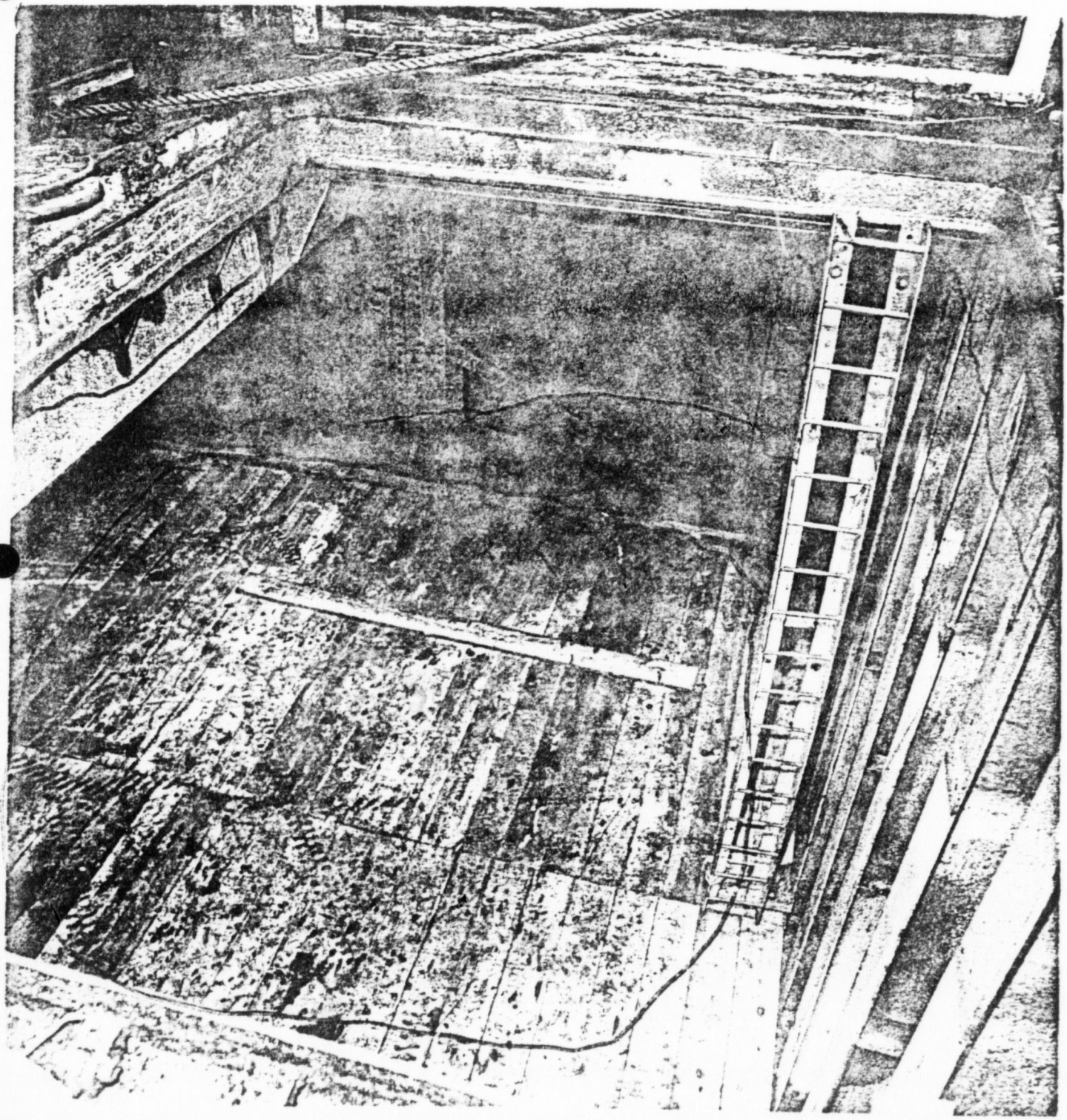
Pl's Exhibit 3

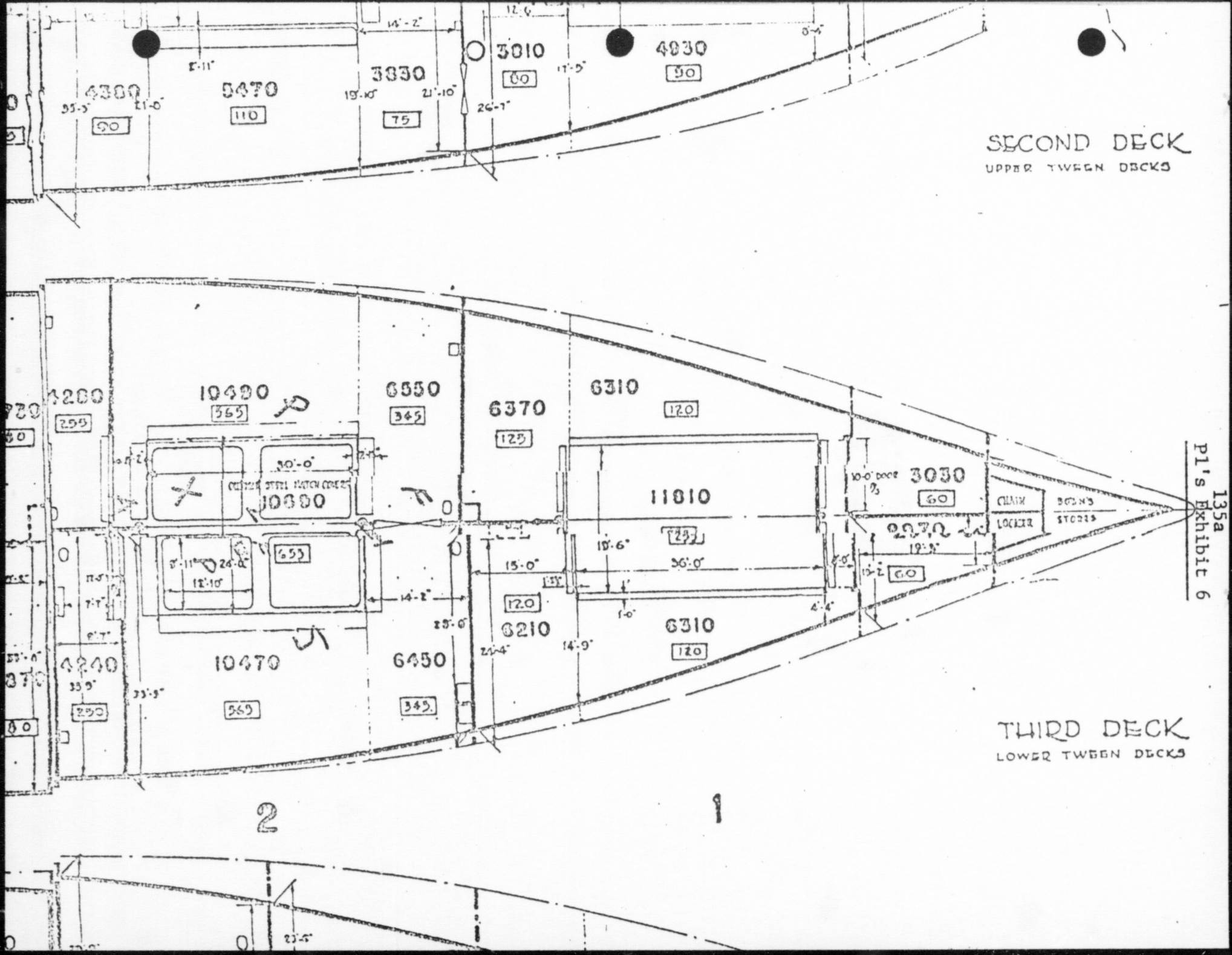


Plaintiff's Exhibit 4



Plaintiff's Exhibit 5




4380
5470
3330
3010
4030
SECOND DECK
UPPER TWEEN DECKS
10490
6550
6370
6310
11810
3030
10880
6210
6310
10470
6450
4240
THIRD DECK
LOWER TWEEN DECKS
135a
Pl's Exhibit 6
2
1

Log of the STEEL MINER from Guam

Hour	R.P.M.	Course True	Course Gyro	Course Steer'g	Course Stand	Stand. Comp Var.	Stand. Comp Dev.	Wind Direction	Wind Force	Barometer	Lookouts	Air Temp.
0100											Dunn	
0200								ENE	5	29.68	Notaro	
0300											Donovan	
0400	72.5	071	074°	071°	072°	22	0	ENE	5	29.66	Dunn	
0500											Lee	
0600						20E	0.2W	ENE	5	29.70	Notaro	
0700												
0800	71.5	071	074	070	071	20	0.7W	ENE	5	29.70		
0900												
1000								ENE	5	29.73		
1100												
1200		254	258	249	252	22	0	ENE	5	29.73		

Noon Position	Course Made Good	Distance	R.P.M.	Length of day	Average Speed C	Slip	Fuel Bbls.	Water Tons
Lat. 14°30'N	VAR	Obs. 302		24	12.5		Consumed	Consumed
Long. 145°21'E		Eng.			Hrs	%	On Hand	On Hand

Hour											
1300											
1400											
1500											
1600	290	305	302	303	22	0	ENE	4-5	29.67		
1700											
1800											
1900										Fire Philippines (sic)	
2000	—	HOVE-TO	—	—	—	—	—	NW	3	29.75	
2100											
2200										BASH	
2300										MELIZMIS	
2400	72.4	051	050	077	074	25	0	ENE	5	29.74	WOODWARD

Running Lights

Burning

Midnight to CONTINUOUSLY A.M.

P.M. to Midnight

Draft

	A.M.	P.M.
Fwd.		
Aft		

Tanks

No.													
A.M.													
P.M.													

Bilges

No.		1		2		2A		3		4		5	
A.M.		6	6	5	5	0	8	2	3	1	1	0	0
P.M.													

136a
Pl's Exhibit 19

... PEARL HARBOR ... Date Thursday, June 1, 1972

Zone -10.

Remarks

0200 Pearl Buoy. Rigged to moor E'ly class small.

0300 Pearl Buoy. Moored E'ly class small. Occ. heavy rain. Vessel rolling & pitching. Weather & sea moderate.

0400 Pearl Buoy. Moored E'ly class small. Occ. heavy rain. Vessel rolling & pitching. Weather & sea moderate.

0500 Pearl Buoy. Moored E'ly class small. Occ. heavy rain. Vessel rolling & pitching. Weather & sea moderate.

0600 Pearl Buoy. Moored E'ly class small. Occ. heavy rain. Vessel rolling & pitching. Weather & sea moderate.

0700 Pearl Buoy. Moored E'ly class small. Occ. heavy rain. Vessel rolling & pitching. Weather & sea moderate.

0800 Pearl Buoy. Moored E'ly class small. Occ. heavy rain. Vessel rolling & pitching. Weather & sea moderate.

0900 Pearl Buoy. Moored E'ly class small. Occ. heavy rain. Vessel rolling & pitching. Weather & sea moderate.

1000 Pearl Buoy. Moored E'ly class small. Occ. heavy rain. Vessel rolling & pitching. Weather & sea moderate.

1100 Pearl Buoy. Moored E'ly class small. Occ. heavy rain. Vessel rolling & pitching. Weather & sea moderate.

1200 Pearl Buoy. Moored E'ly class small. Occ. heavy rain. Vessel rolling & pitching. Weather & sea moderate.

1300 Pearl Buoy. Moored E'ly class small. Occ. heavy rain. Vessel rolling & pitching. Weather & sea moderate.

1400 Pearl Buoy. Moored E'ly class small. Occ. heavy rain. Vessel rolling & pitching. Weather & sea moderate.

1500 Pearl Buoy. Moored E'ly class small. Occ. heavy rain. Vessel rolling & pitching. Weather & sea moderate.

1600 Pearl Buoy. Moored E'ly class small. Occ. heavy rain. Vessel rolling & pitching. Weather & sea moderate.

1700 Pearl Buoy. Moored E'ly class small. Occ. heavy rain. Vessel rolling & pitching. Weather & sea moderate.

1800 Pearl Buoy. Moored E'ly class small. Occ. heavy rain. Vessel rolling & pitching. Weather & sea moderate.

1900 Pearl Buoy. Moored E'ly class small. Occ. heavy rain. Vessel rolling & pitching. Weather & sea moderate.

2000 Pearl Buoy. Moored E'ly class small. Occ. heavy rain. Vessel rolling & pitching. Weather & sea moderate.

2100 Pearl Buoy. Moored E'ly class small. Occ. heavy rain. Vessel rolling & pitching. Weather & sea moderate.

2200 Pearl Buoy. Moored E'ly class small. Occ. heavy rain. Vessel rolling & pitching. Weather & sea moderate.

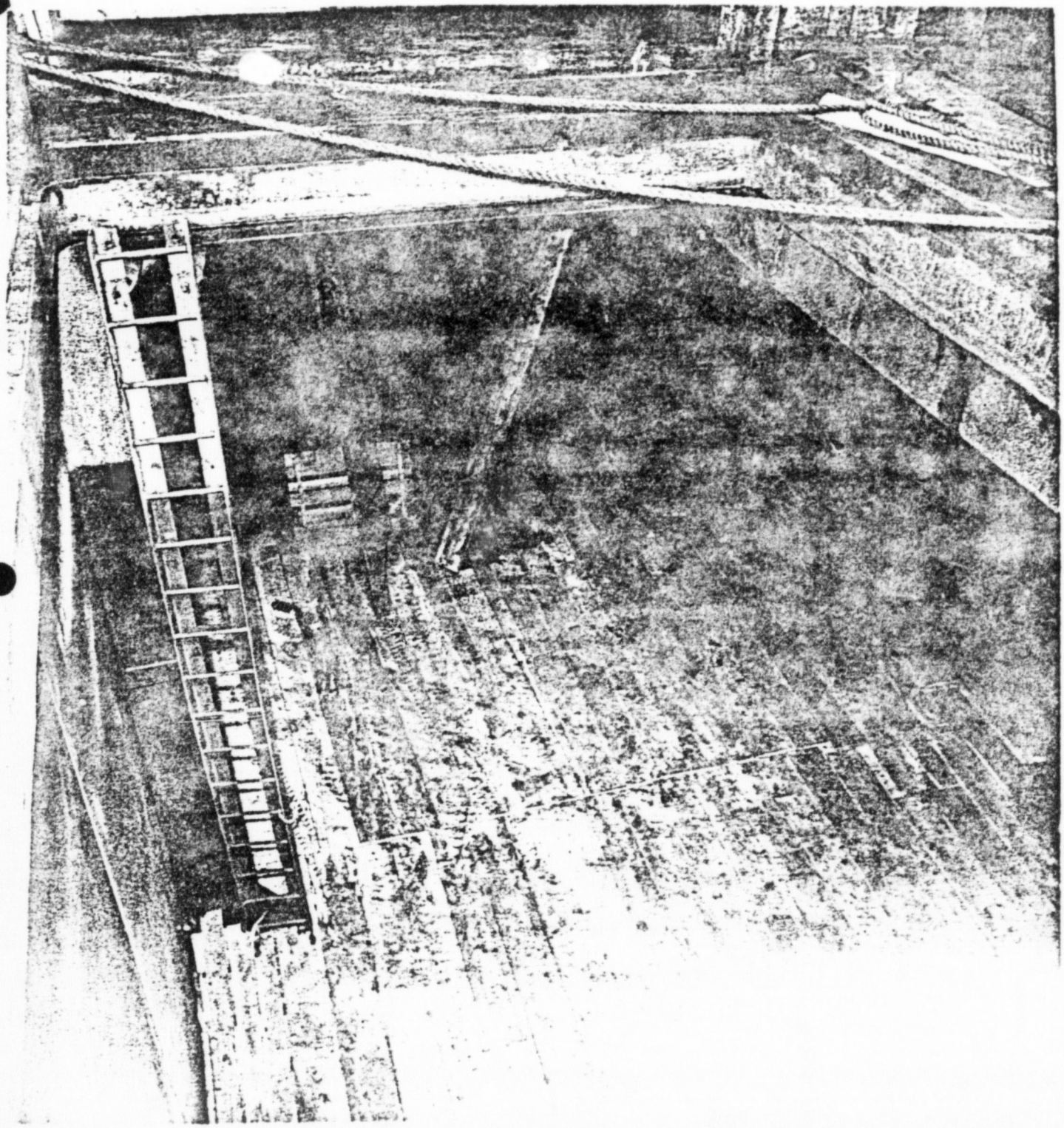
2300 Pearl Buoy. Moored E'ly class small. Occ. heavy rain. Vessel rolling & pitching. Weather & sea moderate.

2400 Pearl Buoy. Moored E'ly class small. Occ. heavy rain. Vessel rolling & pitching. Weather & sea moderate.

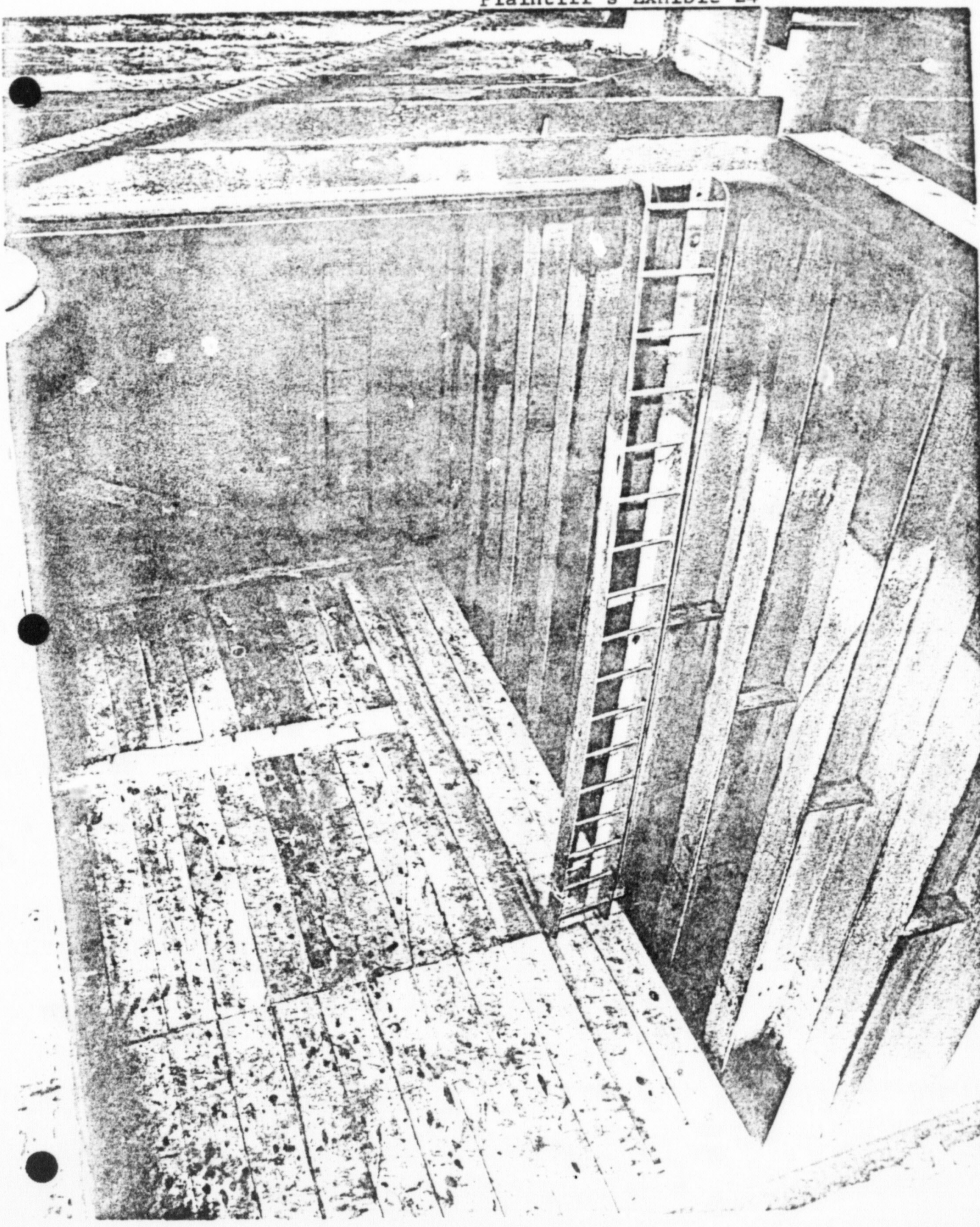
Chief Officer

Master

Plaintiff's Exhibit 23



Plaintiff's Exhibit 24



Log of the STEEL WORKER from Guam.

Hour	R.P.M.	Course True	Course Gyro	Course Steer'g	Course Stand	Stand. Comp Var.	Stand. Comp Dev.	Wind Direction	Wind Force	Barometer	Lookouts	Air Temp.
0100											Same	
0200											"	
0300											"	
0400			Base F 12					E	2-3	29.73	"	
0500											Relief	
0600											"	
0700											"	
0800				Base F T-2				E	3	29.90	"	
0900											KROL	
1000											"	
1100											"	
1200				DEPTH T-2				E	2-3	29.93	"	

Noon Position	Course Made Good	Distance	R.P.M.	Length of day	Average Speed C	Slip	Fuel Bbls.	Water Tons
Lat. [illegible]	/	Obs. /	/	24	/	/ %	Consumed	Consumed
Long. [illegible]		Eng.					On Hand	On Hand

Hour	R.P.M.	Course True	Course Gyro	Course Steer'g	Course Stand	Stand. Comp Var.	Stand. Comp Dev.	Wind Direction	Wind Force	Barometer	Lookouts	Air Temp.
1300											Remarks	
1400											"	
1500											"	
1600			Base T-2					E	3	29.80	"	
1700											Lugo	
1800											"	
1900											"	
2000	—	Blots	Course	—				E	3-4	29.93	Lugo	
2100												
2200											KROL	
2300											WOODLAND	
2400	76.4	070	070	070	071	2E	1E	E	4	29.93	MENZIONIS	

Running Lights

Burning

Midnight to A.M.

1923

P.M. to Midnight

Draft

	A.M.	P.M.
Fwd.	09-04	
Aft	15-02	

13-11

F.O. 5490 Ak

W. 410 Ford

Tanks

No.													
A.M.													
P.M.													

Bilges

No.	1		2		3A		3		4		5		
A.M.	5	4	2	2	0	6	2	2	1	1	0	0	
P.M.													

io. Date Wednesday May 31, 1972

139a
Pl's Exhibit 26

Zone - 10

Remarks

ORIGINAL ☐ CLINIC 47849
ANNUAL ☐ CARD NO.
RE-EXAM XXXXX

SEAFARERS WELFARE PLAN

PHYSICAL EXAMINATION REPORT

June 3, 1971
DATE OF EXAM

SEATIME S.I.U.

NEW YORK 140a
PORT ~~Df's~~ Exhibit A

123574
"Z" NO.

061-24-3967
S. S. NO.

DRAFT CLASSIFICATION

145 Chester Ave. Erlyn New York

NAME LUCO (LAST) Vincent (FIRST) (none) (MIDDLE NAME, INITIAL, OR "NONE")

DATE OF BIRTH RACE CMC RATING DMCX

SUMMARY OF MEDICAL HISTORY

No illness or injury since last physical

I CERTIFY THAT THE ABOVE ANSWERS ARE TRUE AND CORRECT (SIGNATURE) X X Vicente Lucco

WT. 136 HT. 63 TEMP. 98 PULSE 84 RESP. 16 BLOOD PRESSURE 116/84

VISION R20/ 100 L20/ 50 COR. R20/ 50 L20/ 20 HEARING: R/15 15

NEAR RJ C/ LJ C/ L/15 15

Reading Glasses Only

COLOR VISION TEST Normal

GENERAL APPEARANCE AND MENTAL ATTITUDE ✓

	SUMMARY OF FINDINGS:
EYES:	✓
EARS:	✓
NOSE & THROAT:	✓
TEETH & GUMS:	Poor
NECK:	✓
THYROID:	✓
LYMPH NODES:	✓
BREASTS:	✓
HEART:	✓
LUNGS:	✓
ABDOMEN:	✓
HERNIA:	✓
G. U.	✓
ANO-RECTAL:	✓
MUSCULOSKELETAL:	✓
NERVOUS SYSTEM:	✓
SKIN & SCARS:	✓
ARTERIES:	✓
VEINS:	✓

Glasses Required
6-10-71
R 20/100 - L 20/60
Corr. to
R 20/50 L 20/30

CHEST X-RAY 3/5/67 - 4x5 = NEG

BLOOD: HEMATOCRIT HGB 14.0 TYPE A+ NEG

URINALYSIS: SP. G. 1.028 ALBUMIN NEG SUGAR NEG MICRO:

SEROLOGY:

SUMMARY: Defective Vision - uncorrected

EKG: NORMAL ✓ ABNORMAL

RECOMMENDATIONS: Optician Dispense glasses

PHYSICAL RATING 1 2 3

UNION RATING "A" "B" "C"

WAS THIS MAN NOTIFIED OF ANY SERIOUS DEFECTS? YES (X) NO ( )

M.D.

SEAFARERS WELFARE PLAN

PHYSICAL EXAMINATION REPORT

ORIGINAL ☐ ANNUAL ☐ RE-EXAM XX — CLINIC CARD NO. 4439

DATE OF EXAM June 2, 1970

SEATIME S.I.U. _____

PORT NEW YORK 141a — DF's Exhibit A — Z NO. 122457

DRAFT CLASSIFICATION _____

145 Chester Ave. Eklyn New York — S. S. NO. 062-24-3367

NAME LUGO, (LAST) Vincent B (FIRST) (none) (MIDDLE NAME, INITIAL OR NONE)

DATE OF BIRTH 5/20/22 — RACE Cauc — RATING DECK

SUMMARY OF MEDICAL HISTORY

Severe cold last wk seen by PMO. still takes medication
no other interval hx since phys. Jan Apr 69.

I CERTIFY THAT THE ABOVE ANSWERS ARE TRUE AND CORRECT (SIGNATURE) Vincent Lugo

WT. 134 HT. 63 TEMP. 98 PULSE 80 RESP. 16 BLOOD PRESSURE 125/76

VISION R20/ 40 L20/ 25 COR. R20/ L20/

NEAR RJ C3 LJ C2

COLOR VISION TEST N

HEARING: R/15 15 L/15 15

GENERAL APPEARANCE AND MENTAL ATTITUDE V

	SUMMARY OF FINDINGS:
EYES:	V
EARS:	V
NOSE & THROAT:	V
TEETH & GUMS:	V
NECK:	V
THYROID:	V
LYMPH NODES:	V
BREASTS:	V
HEART:	V
LUNGS:	V
ABDOMEN:	V
HERNIA:	V
G. U.	V
ANO-RECTAL:	V
MUSCULOSKELETAL:	V
NERVOUS SYSTEM	V
SKIN & SCARS:	V
ARTERIES:	V
VEINS:	V

CHEST X-RAY 5-4-70 (C) - Negative

BLOOD: HEMATOCRIT _____ HGB 15.6 TYPE A+ ECG: NORMAL ✓

URINALYSIS SP. 1.024 ALBUMIN Neg SUGAR Neg MICRO: _____ ABNORMAL _____

SEROLOGY: _____

SUMMARY: Deafness Vasom - Insomnia

RECOMMENDATIONS: None

PHYSICAL RATING (1) 2 3 4 UNION RATING "A" "B" (C)

WAS THIS MAN NOTIFIED OF ANY SERIOUS DEFECTS? YES ( ) NO ( )

Vincent Lugo M.D.

ORIGINAL ☐ ANNUAL ☐ RE-EXAM ☒ CLINIC CARD NO. 10323

SEAFARERS WELFARE PLAN
PHYSICAL EXAMINATION REPORT

142a
Df's Exhibit A

DATE OF EXAM April 25, 1969

SEATIME S.I.U. _____ PORT NEW YORK "Z" NO. 1234574

145 Chester Ave. Bkyn NY 11218

DRAFT CLASSIFICATION _____ S. S. NO. 061-24-3967

NAME LUGO, (LAST) Vincente (FIRST) (none) (MIDDLE NAME, INITIAL, OR "NONE")

DATE OF BIRTH 5/20/22 RACE CAUC RATING DECK

SUMMARY OF MEDICAL HISTORY Denies Hx of CD or serious illness since last exam 4/68

I CERTIFY THAT THE ABOVE ANSWERS ARE TRUE AND CORRECT (SIGNATURE) X Vicente Lugo

WT. 134 HT. 67 TEMP. 97° PULSE 72 RESP. 14 BLOOD PRESSURE 114/70

VISION R20/ 30 L20/ 30 COR. R20/ L20/

NEAR RJ C#2 LJ C#1

COLOR VISION TEST Normal

HEARING: R/15 15' L/15 15'

GENERAL APPEARANCE AND MENTAL ATTITUDE ✓

		SUMMARY OF FINDINGS:
EYES:	✓	Cured Actinolacia med Dec '68
EARS:	✓	in India & Actinolacia med
NOSE & THROAT:	✓	Jan of '68 in Vietnam
TEETH & GUMS:	✓	
NECK:	✓	
THYROID:	✓	
LYMPH NODES:	✓	
BREASTS:	✓	
HEART:	✓	
LUNGS:	✓	
ABDOMEN:	✓	
HERNIA:	✓	
G. U.	✓	
ANO-RECTAL:	✓	
MUSCULOSKELETAL:	✓	
NERVOUS SYSTEM:	✓	
SKIN & SCARS:	✓	
ARTERIES:	✓	
VEINS:	✓	

CHEST X-RAY 3/10/69 - Ref

BLOOD: HEMATOCRIT _____ HGB _____ TYPE O+ EKG: NORMAL _____

URINALYSIS: SP. G. 1.020 ALBUMIN Neg SUGAR Neg MICRO: _____ ABNORMAL _____

SEROLOGY: Neg-VDRL

SUMMARY: Diagnosis Varicose Veins - Recommend

RECOMMENDATIONS: None

PHYSICAL RATING (1) 2 3 4 UNION RATING "A" "B" ("C")

WAS THIS MAN NOTIFIED OF ANY SERIOUS DEFECTS? YES ( ) NO ( )

Vincent Lugo M.D.

SEAFARERS WELFARE

ORIGINAL ☐ ANNUAL ☒ RE-EXAM ☐ CLINIC CARD NO. N # 36920

PHYSICAL EXAMINATION REPORT 143a

DATE OF EXAM _____

PORT NEW YORK Df's Exhibit A "Z" NO. 123574

SEATIME S.I.U. _____

3409 14th Ave. Brooklyn New York S. S. NO. 062-24-3967

DRAFT CLASSIFICATION _____

NAME LUGO ~~VICENTE~~ (LAST) Vincente (FIRST) none (MIDDLE NAME, INITIAL, OR "NONE")

DATE OF BIRTH 5/20/22 RACE WHITE RATING ~~MESSMAN~~

SUMMARY OF MEDICAL HISTORY

No illness since last exam

I CERTIFY THAT THE ABOVE ANSWERS ARE TRUE AND CORRECT (SIGNATURE) X X Vicente Lugo

WT. 165 HT. 6' TEMP. 97.4 PULSE 76 RESP. 16 BLOOD PRESSURE 118/74

VISION R20/ 40 L20/ 20 COR. R20/ 20 L20/ 20 HEARING: R/15 15

NEAR RJ 1 LJ 1 COLOR VISION TEST Normal L/15 15

Lost glasses

GENERAL APPEARANCE AND MENTAL ATTITUDE ✓

	SUMMARY OF FINDINGS:
EYES:	✓
EARS:	✓
NOSE & THROAT:	✓
TEETH & GUMS:	Left molars missing
NECK:	✓
THYROID:	✓
LYMPH NODES:	✓
BREASTS:	✓
HEART:	✓
LUNGS:	✓
ABDOMEN:	✓
HERNIA:	✓
G. U.	✓
ANO-RECTAL:	✓
MUSCULOSKELETAL:	✓
NERVOUS SYSTEM	✓
SKIN & SCARS:	✓
ARTERIES:	✓
VEINS:	✓

#15 Recent Prophylaxis for Malaria Feb. May, 1944

Ishihara Vision 9/25/45 R 20/40 L 20/20 Corrected R 20/20 L 20/20

CHEST X-RAY 31047 - 7-1-44 - Fxs - Neg

BLOOD: HEMATOCRIT _____ HGB 15. TYPE _____ EKG: NORMAL ✓ ABNORMAL _____

URINALYSIS: SP. G. Neg-US ALBUMIN Neg SUGAR Neg MICRO: _____

SEROLOGY: _____

SUMMARY: Defective Vision - No correction

RECOMMENDATIONS: None

PHYSICAL RATING 1 2 3 4 UNION RATING "A" "B" "C"

WAS THIS MAN NOTIFIED OF ANY SERIOUS DEFECTS? YES ( ) NO ( )

Vicente Lugo M.D.

MP1 25M 11-

SEAFARERS' WELFARE PLAN
PHYSICAL EXAMINATION REPORT

5409 14th AVE., BKLYN
144a
Df's Exhibit A

Port NY Date NOV. 14 19 66

Name LUGO (Last) Vincente (none) (First) (Middle name, initial, or "none") Date of Birth 5/20/22 (44)

Rating OS MESSMAN WIPER "Z" No. 1234674 SS: 061-24-3257

Past Medical History:

Have you had any of the following (if so, when)?

Asthma No Heart trouble No Rheumatism No

Tuberculosis No Diabetes No Epilepsy No

Nervous or mental trouble No Stomach trouble Sometimes Nervous

Other illnesses Usual childhood diseases, Chickenpox, measles

No serious illness

Bronchitis 7 yrs. ago Called in Pvt M.D.

Negative history of C.C. or Syphilis.

Skull None

INJURIES: Back None

Extremities None

OPERATIONS: None

I certify that the above answers are true and correct: Signature x Vicente Lugo

Physical Examination:

1. Race Cau. Weight 131 1/2 lbs. Height 62 1/2 ins. Temperature 98⁴

2. Vision: R.20/ 40 L.20/ 20 Corrected: R.20/ L.20/

3. Color Vision ✓ R. Jaeger No. om L. Jaeger No. om

4. Face: Scars, deformities ~

5. Eyes: Lids, pupils, cornea, reflexes, etc. ✓

6. Ears: Discharge, drums, etc. ✓

7. Hearing: R 15/15 L 15/15

8. Nose: Deformities, etc. ✓

9. Mouth and Throat ✓

Teeth and Gums – Bc Left upper & lower molars missing

10. Upper Extremity Defects ✓

11. Glandular System: Thyroid and lymphatics ✓

12. Heart ✓

B.P.: S 112 D 68 Pulse Rate 80 Arteries ✓

13. Lungs ✓

14. Abdomen: Scars, tenderness, masses ✓

15. Hernia: Complete, incomplete or tendency toward ✓

145a
Df's Exhibit A

16. Genitals ✓
17. Rectal ✓

18. Lower Extremity and Spine ✓

19. Skin and Scars ✓

20. Joint and Joint Motion ✓

21. Neuropsychiatric Defect (Romberg, knee jerks, tremors, etc.) ✓
NEGATIVE
31047

22. Blood Serology
Blood Other 1+ 1+ Gm

23. Urinalysis: Albumin Sugar neg Sp. Gr Appearance clear
24. Fluoroscopy

25. X-Ray Report – Film No. 31047 Negative Negative Skull
(1).

26. Electrocardiograph Report and No.

SUMMARY - Negative Chest Right Eye - recanalized

RECOMMENDATIONS - None

RATING 1, (2), 3, 4 "C" (MS) $32.

Seamans Verbatum Report

~~WAS THIS MAN NOTIFIED OF ANY SERIOUS DEFECTS? YES---NO---~~

M.D.

VICTORY CARRIERS, Inc.
MEDICAL LOG

146a
Df's Exhibit B

Sheet No. 3

Voyage #121/19

S/S LONGVIEW VICTORY Voy. 121/19 From 3/19/70 19 To 3/25/70 19

1 No.	2 Date	3 Name and Rating	4 Acc.	4 Ill.	5 1st Visit	5 Rep. Visit	6 Give Brief Description of Injury or Illness Treated, and Apparent Cause	7 Treatment	8 Disp.	9 Rep.	10 Signatures
5	3/19/70	John L. Lincoln At Sea, Ch.Electr.	x		x		0930/Reported that on March 15, 1970 while working on the lub oil purifier the wrench slipped and he fell backwards, hiting his right elbow on the valve handle. There was no visiul marks on the elbow neither any signs of injury, however he reported that it was painfull and has lost some grip.	Requested and obtained Master's Certificate to see a doctor at Cristobal, Panama on vessel's arrival. Also, regarding some blood spitting when coughing.	1	X	On March 20, 1970 this entry was read to seaman but although he admitted that it was correct he refused to sign unless he gets a copy stating that he signed a paper elsewhere before without getting a copy and it costed him $32,000.00. In order to avoid the consequences of the above request, no copy of the entry was given.
6	3/19/70	John L. Lincoln Cristobal Ch.Electr.	X			x	2010/Returned from Colo Solo, Hospital after been examined by Dr. Huebner with the following medical report "X-ray of elbow negative, increased bronchovesiatic markings on Chest X-ray; Contusion of elbow and bronchitis. Permit to apply hot wet Epsom salt compresses to rt. elbow, 1gr.3xdaily" Fit for duty Given hot water bottle to use as necessary ~~Stated~~ Stated "EPSON SALT NOT NECESSARY HOT WATER BOTTLE WILL DO"		1		
7	3/23/70	Clifford L.T. Khader At Sea Rad.Off.		x	x		1530/Reported that he had a head cold accompanied with sore throat and hoarsiness.	Requested and obtained several aspirins also some coughing syrup.	1		Clifford L.T. Khader
8	3/24/70	Thomas Carmichael At Sea 3rd. Officer		x	x		1130/Reported that his left eyelid was itching and a little sore.	Requested and obtained one tube of Ophthalmic Ointment (Mercuric Oxide) to be used as necessary.	1		T. Carmichael
9	3/24/70	Aaron Jobbers At Sea Wiper		x	x		1930/Reported that he had the crabs and requested medication.	Given one can of Incentocide Powder to be used as necessary.(DDT)	1		Aaron Jobbers
10	3/24/70	Vincente Lugo At Sea O.S.		x	x		1845/Reported that he had a cold and that he was coughing. Also that he had a headache.	Given: Several aspirin tablets to take two every 4hrs. Also some cough syrup	1		Vicente Lugo
10	3/25/70	Viconte Lugo At Sea O.S.		x		x	1100/Reported that now when he coughs he feels pain on the chest. Upon been questioned he said that there is no shortness of breath, or sweating. He requested permittion not to work on deck but he said that he can stand his wheel watch, he was instructed that if he feels bad to call for a relief.	Given: Eight tablets of Compocillin-VK of 400,000 units each and instructed to take one every 6hrs. Temper. 98.6 F., oral, Pulse 92 p.minute.	1		Vicente Lugo

COMPLETE IN DUPLICATE. SEE INSTRUCTIONS ON REVERSE SIDE.

ORIGINAL - OFFICE COPY

78870

VICTORY CARRIERS, Inc.
MEDICAL LOG

147a
Df's Exhibit B

Sheet No. 4

S/S S.S.LONGVIEW VICTORY Voy. 121/19 From 3/26/70 19 To 4/5/70 19

1	2	3	4		5		6	7	8	9	10
	Date	Name and Rating	Acc.	Ill.	1st Visit	Rep.	Give Brief Description of Injury or Illness Treated, and Apparent Cause	Treatment	Disp	Rep	Signatures
10	3/26/70	Vicente Lugo At Sea O.S.		x		x	0900/Visited him in his room. Found him in his bod (12/4)and asked him how he felt. He reported that he was feeling much better and that there are no more difficultios, will resume normal work.	Did not give any treatment since everything was normal.	1		Vicente Lugo
11	3/27/70	Victor Koncewicz At Sea 3rd Offec.		x		x	1330/Requested and obtained one bottle of Sodium Bicarbonate powder to be used in the treatment of gout as prescribed by his phycisian.		1		V. J. Koncewicz
12	3/29/70	Tibor Vanyi At Sea Ch. Cook		x	x		1930/Reported that the back of his neck was painfull and had some difficulty in xxx turning it. He said that he had no other symptoms.	Given some coricidin tablets to take one every four hours and two immediately.		x	
12	3/30/70	Tibor Vanyi At Sea Ch. Cook		x		x	1430/Reported that there was no improvent in his neck.	Given: Some Sloan Liniment to be used in the xxxxx area of the neck with massage.	1		Tibor Vanyi
13	3/31/70	Ted E. Scott At Sea Cr.Pantry.	x		x		1000/He reported that some time during the hours of 1100 and 1140, on March 7, 1970 and while taking stores aboard he hit his Rt. arm,at the elbow, somewhere in the passageway or on the outside door. At this time therewere no visible marks or swelling but he claims that it is painfull.	Was told to take Epsom Salt to soak it in and a hot water bottle but he stated that it was not necessary. He will stay a little longer in the shower.	1	x	Ted E. Scott
14	4/1/70	Leonard Buttler At Sea F.W.T.		x	x		1630/Reported that he was suffering from a toothache due to a cavity.	Given: Some Oil ofCloves to use as necessary.	1		Leonard W. Buttler
15	4/5/70	Hector De Jesus At Sea 3rd. Ck.		x	x		1430/Reported that he had an injury before on his right shoulder which now was hurting him and requested some medicine.	Given: An electric hot pad to use whenever it was necessary.	1		Hector De Jesus
16	4/5/70	James Guy At Sea Fist.Asst.Eng.	x		x		1500/Reported that while working in the engine room he burned himself under the left forearm. Therewas a first degree burn of approx. 2 Sq.Inc. under his left forearm.	Dress burn with sterile gauze pad and Petroleum Jelly.	1		James H. Guy

COMPLETE IN DUPLICATE. SEE INSTRUCTIONS ON REVERSE SIDE.

ORIGINAL - OLLA

Master
Chief M

148a
Court's Exhibit 8

Your Honor,

May we hear Mr. Lugo's testimony regarding how he felt between the time he quit his regular watch and re-entered the deep tank area for the second time.

Thank you,

William S. Green, Foreman

Typed for Clarity

Your Honor,

May we hear Mr. Lugo's testimony regarding how he felt between the time he quit his regular watch and re-entered the deep tank area for the second time.

Thank you,

William S. Green, Foreman

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

GERALDINE SALAZAR, being duly sworn, deposes and says: deponent is not a party to the action is over 18 years of age.

On March 16th 1976, deponent served the within Appendix for Plaintiff-Appellant upon Kirlin, Campbell & Keating, attorneys for Defendant-Appellee in this action, at 120 Broadway, New York, New York 1005, the address designated by said attorneys for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper in a post office - official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Geraldine Salazar
Geraldine Salazar

Sworn to before me this
16th day of March, 1976
Arthur Abarbanel

ARTHUR ABARBANEL
Notary Public, State of New York
No. 30-5000775
Qualified in Nassau County
Commission Expires March 30, 1976